

VOL 5 OF 11

No. 74851

PATRICK HENRY MURPHY, JR.
APPELLANT

CAPITAL MURDER
OFFENSE

DEATH
PUNISHMENT

DALLAS
COUNTY

CONTENTS: RR VOLS. 21 - 26

74851

nREPORTER'S RECORD

VOLUME 21 OF 61 VOLUMES

TRIAL COURT CAUSE NO. F01-00328-T

STATE OF TEXAS * IN THE DISTRICT COURT
VS. * DALLAS COUNTY, TEXAS
PATRICK HENRY MURPHY, JR. * 283RD DISTRICT COURT

INDIVIDUAL VOIR DIRE

FILED IN
COURT OF CRIMINAL APPEALS

MAR 9 2004

Goy C. Bennett, Jr.

On the 24th day of September 2003, the following
proceedings came on to be heard in the above-entitled and
numbered cause before the Honorable Vickers L. Cunningham,
Sr., Judge Presiding, held in Dallas, Dallas County, Texas.

Proceedings reported by machine shorthand.

ORIGINAL

A P P E A R A N C E S

APPEARING FOR THE STATE

Mr. Toby Shook
SBOT NO. 18293250
And
Mr. Bill Wirskye
SBOT NO. 00788696
Assistant District Attorneys
133 No. Industrial Blvd.
Dallas, Texas 75207
Phone: 214/653-3600

APPEARING FOR THE DEFENDANT

Ms. Brook Busbee
Attorney at Law
SBOT: 03488000
703 McKinney Ave. Ste. 312
Dallas, TX 75202
214/754-9090

Mr. Juan Sanchez
Attorney at Law
SBOT: 00791599
5630 Yale Blvd.
Dallas, TX 75206
214/365-0700

PROSPECTIVE JUROR INDEX

<u>JUROR</u>	<u>CRT.</u>	<u>STATE</u>	<u>DEFENSE</u>	<u>VOL.</u>
Burley Morvant, Jr.	4	5		21
William Hodges	16	17		21
Flora Williams	31	29		21
Johnny Silva	43	41		21
Gary Danaher	58	56		21

P R O C E E D I N G S

THE COURT: Mr. Morvant.

[Prospective juror in]

THE COURT: Good morning, sir. How are you?

PROSPECTIVE JUROR: Good morning, sir. How are you?

THE COURT: Juror No. 2082, Mr. Joseph Burley Morvant, Jr. Is that pronounced correctly?

PROSPECTIVE JUROR: You got it.

THE COURT: Mr. Morvant, welcome to the 283rd. Have you had enough time this morning to review the guide I provided for you?

PROSPECTIVE JUROR: Yes, sir.

THE COURT: That's where the attorney is going right now, to make some copies of your questionnaire that you filled out for us in May. I'll get it to you in just a second. That way if the attorneys refer to a question that you answered back in May, you can look at your answer and try to refresh your memory.

PROSPECTIVE JUROR: Yeah, I forget those.

THE COURT: Because you were here first this morning, you get to go first. I appreciate people being on time. So that's the way it works. I think you see that we do start on time because we're using your time. Not

1 too bad, is it?

2 PROSPECTIVE JUROR: I like that.

3 THE COURT: There are no wrong answers.
4 You can't make anything of this, other than just an
5 opportunity for the lawyers to visit with you about the law.
6 The objective is for you to understand how it all relates,
7 and then my questions that I ask you at the end of the
8 program are twofold. Number one, do you understand the law
9 and, number two, can you follow the law?

10 PROSPECTIVE JUROR: Right.

11 THE COURT: That's the big picture that I
12 have to look at. Only question I have for you at this time
13 is will you be able to serve this Court for a period of two
14 weeks beginning on November 10th?

15 PROSPECTIVE JUROR: Yes, sir.

16 THE COURT: Mr. Shook?

17 MR. SHOOK: May it please the Court?

18 JOSEPH MORVANT, JR.,

19 having been duly sworn, was examined and testified as
20 follows:

21 DIRECT EXAMINATION

22 BY MR. SHOOK:

23 Q. Is it Mr. Morvant?

24 A. Yes, sir.

25 Q. All right. My name is Toby Shook. I'm going

1 to talk to you on behalf of the State this morning and, like
2 the Judge said, we're only interested in your honest
3 opinions. Usually when we talk to jurors, it's in a big
4 panel, but because it's a capital murder case, the procedure
5 is to do it one on one in an interview.

6 You've given us a lot of information in
7 your questionnaire which, believe it or not, actually saves
8 you some time. But we're just looking for your honest
9 opinions. You've been very straightforward on the
10 questionnaire, so I don't anticipate that you'll have any
11 problem with that. If you have any questions at any time,
12 feel free to ask. Okay?

13 A. Okay.

14 Q. Now, looking at your questionnaire you work at
15 the Rent-A-Center as a manager; is that right?

16 A. Yes, sir, account manager.

17 Q. Kind of tell us what you do on a day-to-day
18 basis.

19 A. Basically just call customers, try to collect
20 the accounts, keep them current, and deliver and pick up
21 merchandise.

22 Q. Okay. And the Judge gave you the time the
23 trial will be, two weeks in November?

24 A. Right.

25 Q. Pretty firm on that. With this much advance

1 notice, you shouldn't have a problem with that?

2 A. No, sir.

3 Q. All right. Let's talk to you, then, kind of
4 how you feel about capital murder. You know, we can't get
5 into the facts, but you know from what the Judge told you,
6 it's a capital murder case in which the State is seeking the
7 death penalty. On your questionnaire you said you favor the
8 death penalty. Tell us kind of in your own words why you
9 favor the death penalty and the purpose you feel it serves.

10 A. Let's see. Well, I favor it to a point,
11 depending on the situation given. I mean, the person comes
12 out and just kills somebody just to kill them, just to take,
13 just to do it, then yes. Some people, given a certain
14 circumstance, being human, usually there's a break because
15 of their situation, like if a husband caught his wife or
16 something like that.

17 Q. Okay. A crime of passion-type situation is
18 what you mean?

19 A. Right. We're just human, I mean, you just
20 catch them and you lose it, so you do something that you
21 don't really realize you're doing. But if a person just
22 comes out and kills them just to kill them, knowing that
23 they're going to do it, then I think they ought to pay for
24 what they did.

25 Q. Do you think it's then just punishment, kind

1 of punishment for punishment's sake for certain crimes
2 because of the brutality, that sort of thing?

3 A. Uh-huh, yes, sir.

4 Q. Okay. Have you ever followed any cases in the
5 media locally or nationally, murder cases that you thought
6 might be deserving of the death penalty or at least that
7 should be an option?

8 A. Yes. I can't remember which ones or what it
9 was, but I know I have.

10 Q. Okay. You know, you put in the questionnaire,
11 we asked if you've known anything about this case. We can't
12 get into the details, but we had a couple of paragraphs
13 about this crime occurring back in Irving on Christmas Eve
14 of 2000, involving the murder of a police officer at an
15 Oshman's. Did that jar any memory at all to you seeing
16 anything on the news regarding it?

17 A. I kind of remember hearing something about it,
18 but not much.

19 Q. Okay.

20 A. Just like a little recall.

21 Q. Okay. But you didn't follow the case closely
22 at all?

23 A. No.

24 Q. All right. If it were, is there any crimes
25 other than murder that if it were up to you, that you might

1 have the death penalty for?

2 A. Um, no.

3 Q. Okay. In Texas, the death penalty is reserved
4 for murder cases, but only certain types. You have to have
5 an intentional killing. And it has to be unjustified. It
6 can't be in self-defense. It can't be, you know, an
7 accident. It has to be a person forms an intent to kill and
8 then they do so. May only take a few seconds to form that
9 intent or they can think about it for days on end.

10 But not every murder case falls in the
11 statute. You know, you can have some brutal killings. I
12 may not like the way my partner here wore his tie today or
13 said something to me. I could pull a gun out and shoot him,
14 laugh about it, callous killing, but I couldn't get the
15 death penalty. I could get life, but I couldn't get death.

16 To get the death penalty, or at least be
17 available, you have to have an intentional murder with some
18 other aggravating fact such as committing a murder during
19 the course of another felony. Murder during a robbery is
20 one example. If I go into a 7-Eleven and shoot the clerk
21 down intentionally during the robbery, that could be a death
22 penalty case. Breaking into someone's home, burglary, that
23 could be a death penalty case, if I murder someone. If I
24 murder someone during a rape, during an arson, or during a
25 kidnapping.

1 Also, murder of specific individuals like
2 police officers on duty, firemen on duty, prison guards on
3 duty, can be a death penalty case. Murder for hire, someone
4 does it for money like a hitman situation. Murder of a
5 child under the age of six, that can be one, and also mass
6 murders or serial killer situations. But those are the
7 specific situations.

8 That list, does that, as far as your
9 personal views, do you agree with those types of crimes
10 being available for the death penalty?

11 A. Yes.

12 Q. Okay. Now, let me ask you this. When we
13 think of capital murder or any crime, we usually think of an
14 example in our head, like I gave you that example of
15 shooting the 7-Eleven clerk, and we think of the triggerman.
16 But many times accomplices help carry out crimes and that's
17 true for capital murder. You may have more than one person
18 or group of individuals commit a crime. Some have a greater
19 role than others, perhaps, but they're all actively
20 participating in the crime.

21 Sometimes in capital murder situations,
22 you have only one triggerman, but you may have others
23 helping him commit the crime in varying degrees. And people
24 feel differently about that as far as what the punishment
25 should be. Some people don't have a problem at all giving

1 the death penalty to the actual man that causes the death,
2 the triggerman. But they might have a problem with the
3 accomplice, someone that's just there assisting, but doesn't
4 actually cause the death.

5 And people feel differently. Some are
6 against that. They draw a line and reserve a prison time
7 maybe for an accomplice, but not the death penalty because
8 he didn't actually cause the death. Other jurors do think
9 that accomplices deserve the death penalty, depending on the
10 facts. How do you feel about that?

11 A. Depends on the person. If he knew that person
12 was going to actually kill that person and didn't bother to
13 stop him and let him keep on doing it, he should deserve the
14 same because he intended to murder anyway.

15 Q. Okay. An example I often give is, let's say
16 Mr. Wirskye and I here wanted to rob a bank. And our plan
17 was for me to take a gun in there and I'm going to point it
18 at the tellers, hold them at bay, threaten them. And then
19 he's going to load up all the money in the cash drawers.
20 During the middle of that, I decide to kill one of the
21 tellers. Maybe I don't like the way they look at me. Maybe
22 he says one is going for an alarm, but I shoot them, and
23 then we flee the bank and we're caught.

24 Obviously, I can be prosecuted for
25 capital murder. I could receive the death penalty. The law

1 says he could, too, because he was actively involved. And
2 if the jury believes that he should have anticipated that a
3 death could occur in that situation, he could be found
4 guilty. Ultimately, he may even receive the death penalty,
5 even though he didn't urge me necessarily to kill anybody.

6 But if the jury believes from the facts
7 that he should have anticipated that a life could be taken,
8 he could be found guilty. How do you feel about that law?

9 A. I don't think it should be a capital, because
10 he didn't know that the guy was going to kill him. I mean,
11 he didn't have no -- any idea that he was going to do it.
12 Just because the guy, whoever, looked at him funny that he
13 didn't intend to kill anybody, so, no, because somebody else
14 done it.

15 Q. So from your own personal point of view, you
16 disagree with that aspect of the law?

17 A. Right, yes, sir.

18 Q. All right. I appreciate your honesty in that
19 and that's what we do. We kind of want to get your honest
20 opinions and sometimes jurors agree with different parts of
21 the law and sometimes they disagree with others, because
22 that's the kind of key the jurors have problems with.

23 To get someone guilty, and we call it the
24 law of conspiracy, that accomplice doesn't necessarily have
25 that intention that, you know, let's go in and kill someone.

1 Maybe he should have known, you know, the guy could do
2 something like that, but there was no plan for that. But
3 the law allows for that guilty finding even if, you know,
4 hey, man, you should have known a guy like that. You knew
5 his personality and what he was prone to do, but maybe they
6 didn't have the plan. But the law would still allow a jury
7 to find him guilty.

8 But from your own personal point of view,
9 you don't think that capital murder conviction should stand
10 against the accomplice? Maybe another crime like robbery or
11 something like that?

12 A. Yes, sir.

13 Q. Okay. And that comes down to the -- because
14 there was no direct plan or direct intent, actually, from
15 that accomplice himself?

16 A. Right.

17 Q. Okay. Fair enough. If you found someone
18 guilty of capital murder and you believe they intentionally
19 killed someone, let's say during a felony, at that point in
20 time you get to the punishment stage. And we get these
21 Special Issues where you have to look at additional evidence
22 and decide if someone is a continuing danger.

23 That first question asks whether there's
24 a probability the defendant would commit criminal acts of
25 violence that would constitute a continuing threat to

1 society. You don't get to it unless you have found someone
2 guilty, if it was proven to you beyond a reasonable doubt.
3 Then you go to the punishment phase.

4 Now, the law says that at that point in
5 time you have to wait, and if there's more information about
6 the person's background or something, look at that. And
7 then look at the evidence you heard in the guilt/innocence
8 stage and decide is he a continuing danger or not?

9 Some jurors tell us, quite honestly,
10 this, though. If I have already determined in my mind that
11 the State's proven to me beyond a reasonable doubt that he
12 is guilty of capital murder, that tells me all I need to
13 know about how dangerous he is. I've reached that
14 determination. Someone would commit a capital murder.
15 They're going to be a danger to society and they wouldn't
16 need any additional information. They quite frankly tell us
17 that my decision is made and that's going to be a yes
18 answer, you know?

19 A. Right.

20 Q. No if's, and's, or but's about it. Other
21 people say no, that wouldn't be the situation. But we want
22 to get every juror's honest opinion on that. If you found
23 someone guilty beyond a reasonable doubt, would that be the
24 situation where you think they're dangerous, if it's an
25 intentional killing during the course of a felony?

1 A. Um, not really. I need to know more about the
2 person himself.

3 Q. What would be important to you?

4 A. His background, what he was before, if he'd
5 done anything like that before.

6 Q. Okay. And if he had -- I take it that would

7 --

8 A. Right.

9 Q. -- mean more to you?

10 A. That would mean more, yes, because if he had
11 done it before, then yes.

12 Q. When you say "done it before." Would it have
13 to be an actual murder or something --

14 A. Murder or if he's been violent or threatening
15 in any way.

16 MR. SHOOK: All right. Can I have just a
17 moment, Judge?

18 THE COURT: Yes, sir.

19 MR. SHOOK: May we approach the bench,
20 Judge? That's all the questions I have.

21 MS. BUSBEE: Your Honor, we can pass the
22 questions. I think we've reached an agreement.

23 THE COURT: Mr. Morvant, we appreciate
24 your time and service to this Court. The parties have
25 agreed to excuse you from this case. That's it. Thank you,

1 .sir.

2 [Prospective juror out]

3 THE COURT: Mr. Hodges.

4 [Prospective juror in]

5 THE COURT: Good morning, sir. How are
6 you?

7 PROSPECTIVE JUROR: Good.

8 THE COURT: Juror No. 2138, Mr. William
9 Burnett Hodges; is that correct?

10 PROSPECTIVE JUROR: Yes, sir.

11 THE COURT: Mr. Hodges, welcome to the
12 283rd. Have you had an opportunity this morning to review
13 the guide I provided for you?

14 PROSPECTIVE JUROR: Yes.

15 THE COURT: And I also provided a copy of
16 your questionnaire that you filled out for us back in May.

17 PROSPECTIVE JUROR: Yes.

18 THE COURT: The attorneys may want to
19 review that with you or have you expound on some of the
20 answers you gave. And just to give you an idea, to get you
21 in the mindset of where we are this morning, the attorneys
22 are going to visit with you about the law in this case and
23 try to, you know, bring you up to speed so you can figure
24 out how it all relates. It gets kind of complicated, so it
25 takes a while to bring people up to speed.

1 The best thing about this is there are no
2 wrong answers, just your honest opinions. If you would, the
3 only question I have for you at this time is will you be
4 able to serve this Court for a period of two weeks beginning
5 on November 10th?

6 PROSPECTIVE JUROR: Yes, sir.

7 THE COURT: At the end of the process I
8 have two questions to ask you. Number one is do you
9 understand the law, and, number two, can you follow the law?
10 That's the big picture. That's for me. So with that, I'll
11 turn it over to Mr. Wirskye. He has a few questions for
12 you.

13 MR. WIRSKYE: May it please the Court?

14 WILLIAM HODGES,
15 having been duly sworn, was examined and testified as
16 follows:

17 DIRECT EXAMINATION

18 BY MR. WIRSKYE:

19 Q. Mr. Hodges, how are you this morning?

20 A. Good.

21 Q. My name is Bill Wirskye and I'll be the
22 Assistant DA that will be visiting with you for the next few
23 minutes. What I'd like to do is follow up on some of the
24 information that you gave us in that questionnaire.

25 A. Okay.

1 Q. Talk to you a little bit, get your thoughts
2 and feelings about the death penalty and capital punishment,
3 and then maybe talk to you a little bit about the laws and
4 the rules that apply in a case like this where the State is
5 seeking the death penalty. What did you think when you got
6 notified to come back for the individual interview?

7 A. Just that they needed a followup on some more
8 information, possibly.

9 Q. Okay. Do you have any concerns or hesitations
10 in possibly being a juror in a death penalty case?

11 A. No.

12 Q. Okay. Let's see. You've lived in Dallas all
13 your life; is that right?

14 A. Yes, sir.

15 Q. Okay. Born in Austin, but I guess you got
16 here pretty quickly?

17 A. Yes.

18 Q. Okay. Tell us what you do for a living.

19 A. Currently I'm a chef instructor.

20 Q. Okay. At El Centro, right?

21 A. Yes, sir.

22 Q. And how long have you been doing that?

23 A. Approximately two and a half years.

24 Q. Okay. Just out of curiosity, what's a normal
25 day like for you?

1 A. Normal day I've got generally a couple of
2 classes each day, one class on Friday which is an all-day
3 situation.

4 Q. What type of problems, if any, would it cause
5 you if you had to take two weeks out of your schedule to be
6 a juror in this case in November?

7 A. It would somewhat be an inconvenience for the
8 director. I have been talking to her, told her that I had a
9 case coming up, or, you know, potential juror. It would
10 cause her some hardship, but it, you know, I don't know what
11 -- I mean, if I'm chosen, I'm chosen. And there's, you
12 know.

13 Q. Okay. Somebody could work around it, if they
14 had to?

15 A. It could be worked around, yes.

16 Q. Okay. Great. When we kind of ask people
17 questions in this questionnaire, sometimes we're never sure
18 exactly what their answers mean because it means such
19 different things to different people. It's so subjective
20 sometimes, no matter how hard we try.

21 A. Right.

22 Q. But I think you've got on your questionnaire
23 on page 5, just to follow up a little bit with you. Towards
24 the middle to the bottom of the page we give you these
25 series of statements and ask whether you agree, disagree, or

1 are uncertain. And just to follow up on that first one. We
2 had most criminals are actually victims of society's
3 problems and you put you agree. And I know that
4 particularly means different things to different people.
5 Have you found it yet?

6 A. There's no -- oh, page 5, okay.

7 Q. You see that very first statement?

8 A. Somewhat. You don't know what people's
9 background is and teaching I get a lot of people with a lot
10 of different backgrounds, a lot of problems, but, you know,
11 everybody has got problems.

12 Q. Okay.

13 A. Concerns.

14 Q. The last statement that we gave you, criminal
15 law treats criminal defendants too harshly. You said you
16 were uncertain about that. I'm just curious what you were
17 thinking when you answered that.

18 A. Some I think are and some aren't. It just
19 depends on the circumstances of an individual case, I guess.

20 Q. Okay. What are your just kind of general
21 overall impressions of the criminal justice system that we
22 have here in Texas? I know you said in your questionnaire
23 it was too slow, but kind of beyond that.

24 A. Well, I haven't had much experience, other
25 than coming down for jury duty. But, you know, it just

1 seems like it moves a little slow sometimes.

2 Q. Okay. Have you ever actually made it on a
3 jury or --

4 A. No, sir.

5 Q. Been down here waiting in the halls and all
6 that stuff?

7 A. Yes.

8 Q. I certainly understand why you think it moves
9 too slow, then.

10 A. Well, I, yeah, I --

11 Q. Let me ask you this. We also ask people kind
12 of to rank themselves on a scale of 1 to 10, 1 being the
13 least and 10 being the most, on how strongly they feel on
14 the use of the death penalty. And I think if I remember
15 looking at your questionnaire, I don't know if it didn't
16 turn out on my copy, but I didn't see anything.

17 A. What page was that on?

18 Q. Page 4. I was just kind of curious where you
19 would kind of rank yourself on that scale.

20 A. Well, I would hope that the death penalty
21 would deter things from happening, but --

22 THE COURT: No, his question is page 4,
23 if you believe that in using the death penalty, how strongly
24 on a scale of 1 to 10 do you hold that belief? See that
25 question? Page 4.

1 PROSPECTIVE JUROR: Oh, probably a 10.

2 Q. (By Mr. Wirskye) Okay. Fair enough. I think
3 you've already told us you hope it would be a deterrent for
4 others?

5 A. I would hope it would be, but --

6 Q. You think a lot of people know --

7 A. Some people, you know, I don't know the
8 circumstances.

9 Q. Let me ask you this. We talk to a lot of
10 people that, such as yourself, that believe in the death
11 penalty and may believe in it very strongly like you, you
12 know, giving yourself a 10. But we kind of deal with
13 different situations down here. Sometimes we talk about
14 capital murder and some people tend to draw lines on when
15 they think it's appropriate and when not. And what I mean
16 by that is this, that you know oftentimes crimes are
17 committed by more than one person.

18 A. Right.

19 Q. A group of individuals can commit a crime.
20 The law allows us to prosecute for that crime everyone that
21 was actively involved in the crime.

22 A. Okay.

23 Q. Whether it's something like shoplifting, all
24 the way up to capital murder. And when you get to a crime
25 like capital murder, oftentimes you may have one person in

1 the group who is the actual triggerman --

2 A. Yes.

3 Q. -- for lack of a better term. He caused the
4 death. He pulled the trigger of the gun. You may have
5 other non-triggermen, accomplices is a word you've probably
6 heard, who could also be found guilty of capital murder.

7 A lot of people tell us, even those that
8 are very strongly in favor of capital punishment, that while
9 they think it's appropriate in the case of the triggerman,
10 if it were up to them, they would not have the death penalty
11 available for the accomplices, for whatever reason,
12 religious, moral, or ethical, or maybe their sense of
13 proportion. You know, they may want to lock the accomplices
14 up for life, but they don't think the death penalty is
15 appropriate for the accomplice. Where do you kind of fall
16 down on that issue?

17 A. See, I don't know what brought this group
18 together. I don't know their connection, so I -- but if
19 they were just there and didn't actually do it, then I would
20 have to maybe look and see, you know, their circumstances
21 around that.

22 Q. Okay. Maybe a case by case basis?

23 A. Yes.

24 Q. Okay. Well, let me give you a hypothetical or
25 an example to explain kind of how the law works in Texas

1 when we're talking about accomplices.

2 A. Okay.

3 Q. Say the prosecutor and myself decide that we
4 are going to rob a bank.

5 A. Okay.

6 Q. We get together and the plan is for Mr. Shook
7 here to take the gun in and hold up the tellers. And while
8 he's doing that, I'm going to take a bag in and kind of go
9 through the cash drawers and collect all the money and we're
10 going to get away from our bank robbery. And that's our
11 plan.

12 But say as we go in, for whatever reason,
13 maybe one of them looks at Mr. Shook the wrong way or we see
14 one of them going for a silent alarm for the police and I
15 tell him that, Mr. Shook shoots and kills, intentionally
16 kills, one of those tellers. He's committed capital murder,
17 an intentional murder in the course of a robbery, which I
18 know you read could be one of the situations where we use
19 the death penalty in Texas.

20 A. Yes.

21 Q. He could, obviously, be convicted of capital
22 murder and ultimately face the death penalty, depending on
23 how the jury answers those Special Issues. The law also
24 allows it for me, the accomplice, depending on the facts and
25 circumstances. What do you think about it in that type

1 scenario?

2 A. Well, going in with a plan like that, I mean,
3 obviously, some thought was put into what needs to be done
4 to get in and get what you want to do and get out, so
5 something was planned.

6 Q. Okay.

7 A. There was some preplanning of it.

8 Q. Okay. The level of planning would be very
9 important to you?

10 A. Yes.

11 Q. Why is that?

12 A. You know, if you had to think about something
13 that hard to steal something or, you know, what have you,
14 something had been planned, I mean, so there was some -- if
15 you saw them and said there's somebody over there.

16 Q. Okay. So you wouldn't automatically?

17 A. It would almost seem to me that you might as
18 well have pulled the trigger.

19 Q. And that's one of the ways that we can
20 prosecute an accomplice. If I did say, hey, Mr. Shook, he's
21 going for the silent alarm, shoot and kill him. At that
22 point I have directed him, basically, and assisted him in
23 committing a capital murder.

24 A. Yes.

25 Q. The other way we can get there for an

1 accomplice is under the law of conspiracy. You know, we
2 conspired or agreed to commit that bank robbery and even
3 though I didn't have any intent that someone would get hurt
4 -- let's go back to the first scenario where somebody just
5 looks at him the wrong way and he takes it upon himself to
6 shoot and kill someone.

7 Under those facts I wouldn't have any
8 intent that anyone get hurt. I didn't aid or direct him to
9 do it, but yet the law says nevertheless I could still be
10 found guilty of capital murder and potentially face the
11 death penalty, if I should have anticipated that a life
12 could have been taken during that crime. What do you think
13 about that?

14 A. I feel as though if one person has a gun and
15 both of you go in, I mean, that there's obviously a plan, I
16 mean, whether you flipped the coin to see who carried the
17 gun in or what.

18 Q. Okay.

19 A. There was a plan.

20 Q. Sounds like maybe you agree with that law,
21 kind of that standard of they should have anticipated?

22 A. Yes.

23 Q. Then they could potentially face the death
24 penalty?

25 A. Yes.

1 Q. Okay. Fair enough. Mr. Hodges, like
2 everybody we talked to, you've heard something about this
3 case.

4 A. Yes.

5 Q. It was in the media, fairly high profile case.

6 A. Yes.

7 Q. And we know, having done this for a while, it
8 affects different people differently and different people
9 have different levels of knowledge about the case. I'm just
10 curious what you've heard about the case or what do you know
11 about the case?

12 A. It had been quite a time ago and to be quite
13 honest with you, what I hear on the news, I mean, you hear
14 short snippets and it doesn't give you a whole lot of,
15 doesn't give you a really big picture. I mean, they try to
16 sensationalize a lot of stuff so it doesn't -- the news is
17 just kind of noise and it just, you know, unless it's
18 something that directly affects me --

19 Q. Have you kept up with any of the subsequent
20 court proceedings in these cases?

21 A. Not really. I haven't really been interested.

22 Q. Okay. Do you think if you were selected to be
23 a juror on this case anything that you might have heard,
24 read, or seen would influence your verdict in any way?

25 A. No, sir.

1 Q. Okay. Fair enough. You said in your free
2 time you like to watch Nascar?

3 A. Yes, sir.

4 Q. Who is your favorite driver?

5 A. It depends week to week. Depends on who is
6 being bad.

7 Q. Okay. What do you think about Jimmy Spencer?

8 A. He's okay, but he's just one of the guys.
9 He's not really one of the -- he's, I guess, kind of runs in
10 the pack and doesn't really do a whole lot.

11 Q. Yeah. He's my favorite guy. He never wins,
12 but he always tends to wreck and take other people out. As
13 long as Jeff Gordon doesn't win, I'm usually fairly happy.

14 A. Yeah, a lot of people feel that way.

15 MR. WIRSKYE: I think that's all I have,
16 Judge. I'll pass the witness.

17 MS. BUSBEE: Your Honor, I believe we've
18 reached an agreement on this juror.

19 THE COURT: Mr. Hodges?

20 PROSPECTIVE JUROR: Yes, sir?

21 THE COURT: The parties have agreed this
22 case is not for you.

23 PROSPECTIVE JUROR: Is not for me?

24 THE COURT: Is not for you.

25 PROSPECTIVE JUROR: Okay.

1 THE COURT: So we appreciate your time
2 and service to this Court and you are free to go.

3 [Prospective juror out]

4 THE COURT: Ms. Williams.

5 [Prospective juror in]

6 THE COURT: Good morning, how are you?

7 PROSPECTIVE JUROR: I'm fine. How are
8 you doing?

9 THE COURT: I have juror No. 2140, Flora
10 Dean Williams.

11 PROSPECTIVE JUROR: Yes.

12 THE COURT: How are you?

13 PROSPECTIVE JUROR: I'm fine.

14 THE COURT: Welcome to the 283rd. I'm
15 glad you were able to come in this morning. We felt that
16 would probably be a little easier on your schedule than this
17 afternoon.

18 PROSPECTIVE JUROR: Right.

19 THE COURT: That shows you that we do
20 listen and we do try.

21 PROSPECTIVE JUROR: Okay.

22 THE COURT: Have you had an opportunity
23 this morning to review the guide that I provided for you?

24 PROSPECTIVE JUROR: Some of it.

25 THE COURT: Okay. And you were provided

1 a copy of your questionnaire that you filled out back in
2 May?

3 PROSPECTIVE JUROR: Right.

4 THE COURT: The objective this morning is
5 the lawyers will go over with you and visit with you about
6 the law in this case and bring you up to speed on how it all
7 relates. At the end of the program my job is to determine
8 two things, one, do you understand the law, and, two, can
9 you follow the law. That's my big picture. The only
10 question I have for you at this time is will you be able to
11 serve this Court for two weeks beginning on November 10th?

12 PROSPECTIVE JUROR: No.

13 THE COURT: Why?

14 PROSPECTIVE JUROR: I keep children
15 during the day.

16 THE COURT: Now, the law provides if you
17 have legal custody of a child of the age of ten or under,
18 you may claim an exemption. Do you have legal custody of
19 these children?

20 PROSPECTIVE JUROR: My grandson, yes.

21 THE COURT: I understand, but do you have
22 legal custody? You may keep them or babysit, but that's not
23 legal custody.

24 PROSPECTIVE JUROR: No.

25 THE COURT: You do not have an exemption.

1 Mr. Shook, would you like to inquire?

2 MR. SHOOK: I will inquire, Judge, thank
3 you.

4 FLORA WILLIAMS,
5 having been duly sworn, was examined and testified as
6 follows:

7 DIRECT EXAMINATION

8 BY MR. SHOOK:

9 Q. Ms. Williams, as the Judge said, we're just
10 interested in your honest opinions. And from reading your
11 questionnaire, you seem to me to be the type of person that
12 does that. You just tell us what's on your mind and you are
13 very honest; is that right?

14 A. Yes.

15 Q. Okay. Let me talk about this situation with
16 your children. Everyone has different things going on with
17 their life. And back in May on your questionnaire you said
18 you have children you are keeping in your home and no one to
19 oversee them, if you go away. Do you have more than one
20 child you have to care for?

21 A. Yes.

22 Q. How many children are there?

23 A. I have two.

24 Q. Okay. And one of them is your grandson?

25 A. No. One stay with me, but I keep two in the

1 daytime that is not in school.

2 Q. So the one that stays with you, is that your

3 --

4 A. That's my grandson.

5 Q. And does he stay with you at night, also?

6 A. Yes.

7 Q. So he's there at your house at all times?

8 A. Right.

9 Q. How long has he been living with you?

10 A. Five years.

11 Q. Okay. And how old is he?

12 A. Five.

13 Q. So you've been raising him since he was a
14 baby?

15 A. Yes.

16 Q. And for all intents and purposes, then, have
17 you been acting as his mother, raising him, feeding,
18 clothing, providing for him?

19 A. Well, his father stay there, too, also.

20 Q. Okay. Is his father there during the day?

21 A. No.

22 Q. Okay. So during the day are you the only one
23 there to care for him?

24 A. Right.

25 Q. And that's where your concern comes from?

1 A. Yes.

2 Q. If you were -- had to be on the jury for that
3 two-week period, would there be anyone else that could
4 possibly take care of him or would it be a situation where
5 he could be left unattended or left with someone that you
6 didn't know that well or something like that?

7 A. He's in school.

8 Q. When does he get out of school?

9 A. 2:45.

10 Q. Okay. Well, the trial, you'd be down here
11 until 4:30 or 5:00, then. Would there be anyone there to
12 care for him at 2:45, or --

13 A. No.

14 Q. That's what you do?

15 A. Right.

16 Q. Would it be a situation, then, if, and this is
17 a hypothetical situation, if you were placed on a jury,
18 then, obviously, there would be no one there to care for the
19 child; is that right?

20 A. Right.

21 Q. I believe your husband has some type of
22 disability; is that right?

23 A. Right.

24 Q. So he's unable to do that?

25 A. Right, correct.

1 Q. Okay. Obviously, then, that would cause you
2 some concern, if that were the situation, if he didn't have
3 the proper care?

4 A. Right.

5 Q. You would be unable to concentrate on the case
6 in that situation?

7 A. Not unless I can get me a babysitter.

8 Q. Okay. And that would cause you a lot of
9 concern?

10 A. Right.

11 Q. Additionally, on your questionnaire you put
12 that you are not in favor of the death penalty. From your
13 point of view, you are against it; is that right?

14 A. Somewhat, yes.

15 Q. Is that a religious belief --

16 A. No.

17 Q. -- on your part or what type of belief? What
18 is that based on?

19 A. It's just based on my feelings.

20 Q. Okay. But it's something that you're really
21 not for --

22 A. Right.

23 Q. -- as a law?

24 A. Right.

25 Q. And why is that?

1 A. Well, I just don't believe a life should be
2 taken for a life. I mean, I would have to hear the case
3 first to see if the death penalty would be, you know,
4 satisfactory and what happened to the person.

5 Q. Okay. Well, ma'am, let me ask you this. We
6 brought down like a thousand people because everyone feels
7 differently. We've got some people that are against the
8 death penalty for religious reasons or moral reasons or
9 personal reasons and they tell us that, honest with us, and
10 that's fine. That's fine. And they couldn't ever render a
11 decision which would take another person's life. It would
12 bother them too much or their beliefs would prevent them
13 from doing that and they tell us that and that's fine. We
14 excuse them and they go on to another case somewhere down
15 the line.

16 We have other people that are just
17 adamantly for it. They really can't be fair either, and
18 they tell us that, and we excuse them, also. And that's why
19 we bring so many people down because people feel
20 differently. You don't know what kind of jury you're going
21 to be brought down on when you come down here. It might be
22 a DWI case, a divorce case, or it could be a capital murder
23 in which the State is seeking the death penalty. It's just
24 -- it's not your choice, obviously.

25 But when we, we have to question you and

1 then we, by law, have to ask you these questions under oath.
2 Do you really think, then, now that you know it's a capital
3 murder case in which the State is seeking the death penalty,
4 and you have reservations or some objections from your
5 personal point of view against taking a life, would this be
6 really the type of case you could sit on as a juror or would
7 you be better suited for another type of case that did not
8 involve the death penalty?

9 A. I think I would be best suited for another
10 case.

11 Q. And that's because of the potential of taking
12 a life of another human being?

13 A. Right.

14 Q. And that's where your objection comes from?

15 A. Right.

16 Q. And you, I take it you feel strongly about
17 your objections about taking a life. It's something you've
18 thought about; is that right?

19 A. Exactly.

20 Q. And you're not going to be able to put those
21 feelings aside, will you?

22 A. No.

23 Q. And that might interfere with your ability to
24 objectively look at things, obviously, if you're thinking
25 about that; is that right?

1 A. Right.

2 Q. Coupled with your problem with the child care
3 also might interfere with your concentration?

4 A. Right.

5 CROSS-EXAMINATION

6 BY MS. BUSBEE:

7 Q. Ms. Williams, are you telling us that you just
8 couldn't really give the State a fair trial on a death
9 penalty case? I think that's what he was asking you.

10 A. Right.

11 Q. Because they're entitled to rely on the law
12 and if that's the case, then I think we could probably agree
13 on it. I just wanted to get you to tell me that, if that's
14 your true feeling.

15 A. Yes.

16 Q. So you just wouldn't give anybody the death
17 penalty as a practical matter?

18 A. Exactly.

19 Q. All right. I guess we can agree on that. I
20 appreciate your honesty. Well, actually I don't, but they
21 do.

22 MR. SHOOK: Judge, I believe we have an
23 agreement.

24 THE COURT: Ms. Williams, the parties
25 have agreed to excuse you. You saw very quickly that I

1 wouldn't, right?

2 PROSPECTIVE JUROR: Right.

3 THE COURT: I mean, I have a legal
4 framework I have to go through. Either you are or you're
5 not and you weren't. So I'm going to -- I'm not going to
6 let you go. But they are much more sympathetic than I am.
7 So they have excused you from jury service. We appreciate
8 you coming down, but you will not serve on this jury. Thank
9 you so much.

10 PROSPECTIVE JUROR: Okay. Thank you.

11 [Prospective juror out]

12 (Recess)

13 THE COURT: Ms. Johnson.

14 [Prospective juror in]

15 THE COURT: Good afternoon. Please have
16 a seat. We have juror No. 2143, Lisa L. Johnson. Good
17 afternoon, Ms. Johnson. How are you?

18 PROSPECTIVE JUROR: I'm fine. How are
19 you doing?

20 THE COURT: Have you had enough time to
21 review the guide I provided for you?

22 PROSPECTIVE JUROR: Yes, this here? Yes.

23 THE COURT: We've also given you a copy
24 of the questionnaire that you filled out for us in May. The
25 attorneys may want to visit with you about some of the

1 answers or have you expound upon what you have already given
2 us. If necessary, you may refer to it, if you need it.

3 The process here today is designed to
4 give you a better understanding of the law. It's a lot to
5 give someone when they first walk in the door and we don't
6 expect you to understand how it all relates at this point.
7 That's what the discussion is about.

8 The objective at the end of this
9 interview process is I have two questions I must ask, one,
10 do you understand the law, two, if you understand the law,
11 can you follow the law? That's the big picture that I have
12 to look at.

13 PROSPECTIVE JUROR: Yes.

14 THE COURT: Before I turn it over to the
15 lawyers, is there any reason why you cannot serve us for the
16 two weeks beginning on November 10th?

17 PROSPECTIVE JUROR: Yes. I'm a full-time
18 -- I have a full-time job and I'm a full-time student.

19 THE COURT: I can't help you with the
20 full-time job. There is an exemption under the Government
21 Code for a full-time student. Can you tell me more about
22 what you are doing?

23 PROSPECTIVE JUROR: As far as the school?
24 Yes, I'm taking 16 hours. I'm completing my bachelor's
25 degree in December, going full-time.

1 THE COURT: And where do you attend?

2 PROSPECTIVE JUROR: I go to Northwood
3 University in Cedar Hill.

4 THE COURT: Sixteen hours?

5 PROSPECTIVE JUROR: Uh-huh.

6 THE COURT: And what will your degree be?

7 PROSPECTIVE JUROR: It will be Bachelor's
8 of Business Administration, Business Management.

9 THE COURT: I believe you put that on
10 your questionnaire, but we never know exactly if you are
11 full-time or part-time or whatever. I do remember reading
12 that. And you indicated that you would be through in
13 December, but we didn't know if it was night school or what
14 was your situation. So you're telling me that you wish to
15 claim the exemption?

16 PROSPECTIVE JUROR: Right.

17 THE COURT: Any objection by the State?

18 MR. SHOOK: No, sir.

19 THE COURT: Defense?

20 MS. BUSBEE: No, Your Honor.

21 THE COURT: Ms. Johnson, you do have an
22 absolute exemption. It will be the last semester you will
23 be able to claim that, so maybe we'll catch you the next
24 time around. Thank you very much for coming in. We wish
25 you well.

1 PROSPECTIVE JUROR: Thank you.

2 [Prospective juror out]

3 THE COURT: Mr. Silva, please.

4 [Prospective juror in]

5 THE COURT: Good afternoon, sir. How are
6 you?

7 PROSPECTIVE JUROR: Just fine, sir.

8 THE COURT: Welcome to the 283rd. We've
9 got juror No. 2172, Mr. Johnny J. Silva. Mr. Silva, thank
10 you for being here on time and have you had an opportunity
11 to read the guide I provided for you this afternoon?

12 PROSPECTIVE JUROR: Yes, sir.

13 THE COURT: I gave you a copy of the
14 questionnaire that you filled out in May to let you refresh
15 some of your thoughts and the answers you provided for us at
16 that point. I give you a lot of law to think about. The
17 idea of this interview process now is for the attorneys to
18 go over that law with you in more detail and give you a
19 better frame of reference so you can understand how it all
20 relates. And ultimately I have two questions to answer at
21 the end of the process. Number one is, do you understand
22 the law, and, number two, can you follow the law? That's
23 the big picture I have to look at.

24 PROSPECTIVE JUROR: Yes, sir.

25 THE COURT: So there are no wrong

1 answers. Some people feel kind of intimidated when you come
2 in and you're the focus of attention, but it's a whole lot
3 better than having all 700 people down there at one time.
4 You recall it was a hot morning and all stuffed in there.
5 So this is a little more intensive, but also we try to make
6 it as informal as we can. There are no wrong answers, just
7 honest opinions. Okay?

8 PROSPECTIVE JUROR: Yes, sir.

9 THE COURT: Only question I have for you
10 at this point before we begin, will you be able to serve
11 this Court for a period of two weeks beginning on November
12 10th?

13 PROSPECTIVE JUROR: Well, something has
14 come up at work that we've scheduled a big national meeting
15 in Florida, starting actually November the 12th. And it's
16 like a five-day meeting. So that might be a problem for me
17 to miss that meeting.

18 THE COURT: Can you tell me a little bit
19 about your work?

20 PROSPECTIVE JUROR: I work for the Post
21 Office for the southwest area. I'm manager of budget for
22 the area which encompasses five states, Texas, Oklahoma,
23 Arkansas, Louisiana, and Albuquerque. This national meeting
24 is a meeting of all the finance managers at the area level
25 and all of the districts that we have in our five-state

1 area, including other areas like the Chicago area, the
2 Pittsburgh area, and the Florida area.

3 THE COURT: Mr. Silva, I know that
4 anybody that's on this jury will have conflicts at work or
5 at home and business reasons are not allowed to let someone
6 off of jury service. The reason we're doing this, this far
7 enough out in advance, is if you are selected to sit on this
8 jury, you will be able to work around that and have someone
9 take your place at that meeting.

10 Especially for the post office, I know
11 that you want to think that you're indispensable, but it's
12 something that I know they would be able to work around. So
13 I can't excuse you from jury service for that. We'll just
14 have to deal with it.

15 PROSPECTIVE JUROR: I understand that.

16 THE COURT: Thank you, sir. Mr. Shook,
17 would you like to inquire?

18 MR. SHOOK: Yes, sir.

19 JOHNNY SILVA,
20 having been duly sworn, was examined and testified as
21 follows:

22 DIRECT EXAMINATION

23 BY MR. SHOOK:

24 Q. Mr. Silva, my name is Toby Shook. I'll be
25 asking questions on behalf of the State this afternoon. As

1 the Judge said, there aren't any right or wrong answers to
2 any of our questions. We're just looking for your honest
3 opinions. I believe you've been down on a couple of juries
4 before; is that right?

5 A. Yes. I've been on one murder jury before,
6 yes, I have.

7 Q. Usually some of the rules we'll talk about,
8 you will be familiar with them because they apply to those
9 types of cases. Of course, you recall when you were
10 selected that last jury the lawyers probably talked to you
11 in a group. But because it is a capital case in which we
12 seek the death penalty, we have this procedure where we talk
13 to each juror individually.

14 I'm going to ask you a few things off
15 your questionnaire and then talk to you about capital
16 murder, some of the rules and laws that apply. Kind of just
17 as a followup with what you were talking about with the
18 Judge, in your day-to-day duties with the postal service,
19 you manage the budget for several -- this particular area?

20 A. Yes. I have a five-state area, which
21 encompasses -- we have an operating budget of about 5.6
22 million dollars. Excuse me, 5.6 billion dollars, with the
23 revenue of about five billion dollars. So that's what we
24 manage, yes.

25 Q. Okay. And that's what your meeting is about

1 in November?

2 A. It encompasses that in general. I mean, we
3 have other things that we cover. We also cover our
4 accounting issues. I mean, we have several new systems that
5 we're bringing in, you know, on line this year and those
6 things will be, you know, gone over.

7 Q. Okay. Let me talk to you a little bit about
8 that case you sat on, which was a murder case, I believe?

9 A. Yes, sir, it was.

10 Q. About how long ago was that?

11 A. That was in 1998.

12 Q. Okay. Kind of fill us in on the facts as you
13 recall, kind of generally what kind of case it was.

14 A. In general, it was an individual who just came
15 upon another individual in the public streets and just shot
16 him for no apparent reason. I mean, there wasn't theft or
17 anything like that. But, I mean, it was --

18 Q. Just shot him with a handgun?

19 A. Just shot him with a handgun and shot him, I
20 believe it was five or six times.

21 Q. Okay. And they apparently didn't know each
22 other prior to that?

23 A. No.

24 Q. Okay. Did the defendant testify in that case?

25 A. No.

1 Q. Okay. And you put in the questionnaire that
2 he was found guilty and your assessment was 60 years that
3 you recall?

4 A. That's correct.

5 Q. Anything as far as the deliberations go, were
6 there, was it heated at all? Was there any major arguments
7 or was it a pretty open-and-shut case?

8 A. It was a pretty open-and-shut case, as far as
9 the guilt part of the verdict.

10 Q. How about punishment?

11 A. The punishment was a little difficult. There
12 was quite a bit of conversation in the punishment. Most
13 wanted to go for the, I believe it was 99 years or life,
14 whichever the case was, you know. And there was a couple of
15 us that kind of leaned toward a lesser punishment. And I
16 think we ended up compromising on a 60 year.

17 Q. Okay. What was going through your thought
18 processes? We have a section in the questionnaire. I don't
19 know if you remember it. It asks if you served on a jury,
20 how much did you participate and we give you a choice of
21 more than others or less and you put less, but you said you
22 had more influence.

23 A. Well, I'm a quiet person in general and I like
24 to listen and evaluate the facts and that's, I think that's
25 what I was thinking of at the time. But I think once I made

1 up my mind, you know, then I communicated a little bit more
2 and I think that did influence somewhat.

3 Q. What was going through your mind, then, on
4 what you were determining what the proper punishment was in
5 that case?

6 A. Well, I was trying to evaluate several things.
7 I mean, to me, you know, it appeared that this was just not
8 premeditated in any way and it was just an emotional thing
9 that the gentleman had just, for whatever reason, you know,
10 it just came upon him to do this and I think most of the
11 jurors were influenced by the fact that five or six rounds,
12 you know, that he let off and, you know, it was a small
13 handgun. And I was thinking, you know, I used to shoot guns
14 a long time ago, that a gun can get away from you sometimes
15 and you don't realize how many times you're pushing, you
16 know, pulling the trigger so to speak.

17 And that kind of came into my thoughts
18 because their big issue was, you know, he shot him five
19 times. And I said, you know, I don't think it makes any
20 difference if you shot him one time or five times, you know.
21 And they wanted to go with a longer sentence because of the
22 five times. I believe that was the biggest thing.

23 Q. What type of weapon was it?

24 A. Like I said, it was a small handgun, like a
25 .22 pistol or something.

1 Q. All right. Now, did the -- was there any
2 prior record shown in the case, any previous convictions,
3 anything like that?

4 A. I don't recall that.

5 Q. Okay. We ask also in the questionnaire about
6 if you followed any cases. And you, like a lot of jurors,
7 put the O. J. Simpson case.

8 A. Yes. That did interest me, yes.

9 Q. Because I guess we couldn't get away from that
10 one. What opinions did you draw from the O. J. case, what
11 you saw and followed in that case?

12 A. Well, as I followed the case, I thought he was
13 going to be guilty.

14 Q. Were you surprised when they came out with a
15 not guilty?

16 A. Yes, I was.

17 Q. Did you think from what you knew about the
18 case that that was not a fair or just decision?

19 A. I did not think so.

20 Q. Okay. And I believe we also asked about if
21 you've known anyone that's gone through the justice system,
22 and you did have a brother-in-law that had a drug case and
23 spent some three months in jail in 2000; is that right?

24 A. I think it was around 2000, yes.

25 Q. Did you know what the facts were involved in

1 that case?

2 A. No, I did not.

3 Q. Okay. So as far as, you know, was he treated
4 fairly by the criminal justice system or do you know?

5 A. I do not know.

6 Q. Okay. Let me ask you about the capital murder
7 and the death penalty. You know from what the Judge has
8 said, that the State is seeking the death penalty. So we
9 want to talk with each juror, how they feel about it. Are
10 you in favor of the death penalty as a law?

11 A. Yes.

12 Q. Okay. Can you just tell us in your own words
13 why you favor it, the purpose you feel it serves society?

14 A. I think the main purpose is it's a deterrent
15 from others committing similar crimes.

16 Q. What types of crimes do you think that are
17 appropriate for the death penalty?

18 A. Well, like anything involving a firearm or
19 basically if you, like, a police officer-type situation, a
20 public servant.

21 Q. Public servant killed in the line of duty?

22 A. Yes.

23 Q. That sort of thing?

24 A. Yes.

25 Q. Okay. As far as your adult years, have you

1 always believed in the death penalty?

2 A. As far as I can remember, yes.

3 Q. It wasn't any specific event that caused you
4 to feel that way? It's just the way you were raised or
5 brought up or opinions you formed?

6 A. Just opinions I formed.

7 Q. Okay. In Texas there's only certain types of
8 cases which are eligible for the death penalty. It has to
9 be a murder case. It has to be an intentional case. A lot
10 of murder cases, like the one you sat on, can be brutal, but
11 you can't get the death penalty. You have to have a murder
12 plus something else, another aggravating fact, such as a
13 murder that occurs during a felony.

14 Murder during robbery, if someone goes in
15 and robs a 7-Eleven and kills the clerk, that could be.
16 Murder during a burglary, during a rape, arson, kidnapping,
17 those are the types of cases. Also murder of specific
18 individuals like a police officer, fireman, or prison guard
19 on duty, murder of a child under the age of six, murder for
20 hire, someone does it for money, and then your serial killer
21 situations, more than one victim.

22 But those are the types of crimes that
23 have been reserved for the death penalty in Texas. As far
24 as that list goes, are there any of those on the list that
25 you disagree with from the standpoint of being considered

1 for the death penalty?

2 A. No.

3 Q. Okay. If it were up to you, would you expand
4 that list at all to include other types of crimes?

5 A. Um, I can't recall, I mean, I don't -- nothing
6 is coming to mind.

7 Q. It sounds all right to you?

8 A. It sounds pretty fair, the items that you
9 discussed.

10 Q. Okay. Now, when we talk about capital murder,
11 usually we think of an example, that's natural, and we
12 usually think of the actual man, the triggerman, causing the
13 death, like the guy who goes into a 7-Eleven, shoots the
14 clerk.

15 But sometimes a capital murder is carried
16 out by more than one individual. There might be several.
17 The common term used for that is accomplices, people that
18 assist in the crime, but maybe they don't actually cause the
19 death. Maybe there is one triggerman, that sort of thing.

20 And people feel differently about that as
21 far as prosecution of capital murder for the death penalty
22 for an accomplice as opposed to a triggerman. Some folks,
23 as far as from their personal point of view, they believe
24 the death penalty can be assessed against the triggerman,
25 someone that actually intentionally murders someone in a

1 capital murder situation.

2 But they have a different view when it
3 comes to an accomplice who assists in some way. Other
4 jurors feel that maybe an accomplice should be prosecuted
5 for the same crime and held accountable, just like the
6 triggerman. But everyone differs. And we want to ask every
7 juror your honest opinion on how you feel about the
8 prosecution of an accomplice in a capital murder situation,
9 a death penalty case?

10 A. I think I would be against that, an
11 accomplice. Naturally, it would depend on the degree, you
12 know, that, I mean, if he just sat in the car or something,
13 that would be different.

14 But if he was there with him and he could
15 have maybe probably prevented the murder from taking place,
16 then under those circumstances, there could be a possibility
17 that I would, you know, vote for that death penalty. But in
18 general it would be difficult for me to say to give a death
19 penalty for an accomplice.

20 Q. Okay. So in the general point of view, you
21 would feel you would reserve the death penalty just for the
22 triggerman?

23 A. That's correct.

24 Q. And the accomplice situation you would be much
25 less likely or unlikely to, especially a situation you said

1 if they were in a car or something like that?

2 A. Yes.

3 Q. What did you mean by that? They still knew
4 about the crime or --

5 A. Just happened to be, you know, either a
6 passenger in the car as maybe the murderer was going by and
7 shot someone or something, he just happened to be a
8 passenger. That's what I was referring to.

9 Q. Let me go over the part of the law of
10 conspiracy and I just want to get your honest opinion on it.
11 Under the conspiracy law, two people can agree to commit one
12 crime and if they are committing that crime and one of the
13 conspirators, one of the criminals, commits another crime in
14 furtherance of that original conspiracy, they can all be
15 held accountable, even if they didn't really intend for that
16 crime to occur.

17 In a capital murder situation, if
18 Mr. Wirsky and I decided we want to rob a bank and I had a
19 gun and our plan was for me to go in and rob it and he was
20 going to help load the money up, and then in the middle of
21 the robbery I start shooting people and I kill one of the
22 tellers.

23 I can, obviously, be prosecuted for
24 capital murder, even get the death penalty. But he, as an
25 accomplice under the conspiracy law, could conceivably also

1 be prosecuted, even if he didn't have the intentions for
2 someone to die.

3 To get someone guilty of capital murder,
4 what we have to prove is we agreed to commit the crime and
5 another murder was committed by myself, and the jury
6 believes he should have anticipated that a murder could
7 occur. And the difference there is someone maybe should
8 have anticipated, but they didn't actually want a crime to
9 occur, the murder to occur. But from all the facts and
10 circumstances from the juror's point of view, they should
11 have anticipated that.

12 So a person can actually be convicted
13 under the law, if they did not intend someone to die of
14 capital murder. And some jurors agree with that. Other
15 people would put more emphasis if it were up to them on the
16 intent. I mean, if he's in there encouraging the person to
17 die, maybe directing him, like, you need to shoot him now,
18 that sort of thing. That's one thing.

19 But the guy didn't even intend for that
20 person to die, maybe he could be held accountable as a
21 robbery, get a lot of years for bank robbery, but not
22 capital murder conviction.

23 How do you feel about that law where the
24 person doesn't even actually have to have that intent to get
25 a conviction on the accomplice?

1 A. If they didn't have that intent, I don't think
2 I could give that death penalty.

3 Q. A lot of jurors feel that way and that's why I
4 cover the law that way because I want to get your true
5 feelings. To get to the death penalty, we do have to
6 actually prove that he anticipated a person would die, but
7 to the conviction it's different. And it could be just
8 should have. And then that's where some people would draw a
9 line and go, look, I know what the law is there, but I can't
10 convict someone unless they have that intent for that person
11 to die, too, because that's the key, the intent. They don't
12 pull the trigger, but their intention is to die, then that
13 would be the key factor for me. But if he doesn't have the
14 intent, then I couldn't do it, and they just disagree with
15 that portion of the law.

16 And it's fine if you agree with that,
17 feel that way. That's why we kind of go over the questions
18 this way. And that's how you feel, if the person didn't
19 have the intent, then you couldn't convict him under the
20 conspiracy law that way?

21 A. That's correct.

22 Q. Okay. Let me talk to you for a minute about
23 these Special Issues. Special Issue No. 1 you don't get to
24 until the punishment phase. And it asks whether there's a
25 probability that the defendant would commit criminal acts of

1 violence that would constitute a continuing threat to
2 society.

3 MR. SHOOK: One moment. Judge, I think
4 based on the juror's last answers then we can, I can -- I
5 can finish with my questions.

6 MS. BUSBEE: We've reached an agreement,
7 Your Honor.

8 THE COURT: Mr. Silva, I appreciate your
9 time and service here to the Court today and the parties
10 have agreed to excuse you. You will not serve on this jury.
11 Thank you so much.

12 PROSPECTIVE JUROR: Thank you.

13 THE COURT: Now you don't have to worry
14 about your meeting.

15 [Prospective juror out]

16 THE COURT: Dr. Danaher.

17 [Prospective juror in]

18 THE COURT: Please have a seat. Good
19 afternoon.

20 PROSPECTIVE JUROR: Good afternoon.

21 THE COURT: Juror No. 2077, Dr. Gary
22 Michael Danaher. Thank you, sir, for -- I believe we had a
23 lady this morning that was scheduled this afternoon and you
24 were scheduled this morning and it turned out that you had a
25 meeting that you needed to have this morning, so it worked

1 out best for both of you. Thank you for being here.

2 PROSPECTIVE JUROR: It worked out.

3 THE COURT: Have you had an opportunity
4 to read the guide I provided for you?

5 PROSPECTIVE JUROR: I have.

6 THE COURT: We also gave you a copy of
7 your questionnaire that you filled out for us back in May.
8 The attorneys may want to refer to some of your answers and
9 you'll have it there --

10 PROSPECTIVE JUROR: I do.

11 THE COURT: -- to refresh your
12 recollection. I don't expect you to understand all the law
13 that I have given you so far. That's what this opportunity
14 is, to visit with you about the law, give you some time to
15 think about, it and understand how it all relates.

16 At the end of the process the Court has
17 to make two, answer two questions. Number one, do you
18 understand the law and, number two, can you follow it?
19 That's my big picture.

20 The only question I have for you at this
21 point is will you be able to serve this Court for the period
22 of two weeks beginning on November 10th?

23 PROSPECTIVE JUROR: As far as I know at
24 this time, I could.

25 THE COURT: Thank you, sir. Mr. Wirskey,

1 would you like to inquire?

2 MR. WIRSKYE: May it please the Court?

3 GARY DANAHER,

4 having been duly sworn, was examined and testified as
5 follows:

6 DIRECT EXAMINATION

7 BY MR. WIRSKYE:

8 Q. How are you doing this afternoon, sir?

9 A. Very well.

10 Q. Good. My name is Bill Wirskye. I'll be the
11 Assistant DA that will be visiting with you for the next few
12 minutes. What I'd like to do is follow up on some of the
13 information that you provided for us in your questionnaire,
14 talk to you a little bit on your thoughts and feelings about
15 the death penalty, since this is a case where the State is
16 seeking the death penalty, and, finally, maybe talk to you a
17 little bit about some of the laws and rules that apply in
18 cases like this.

19 Hopefully some of that will be somewhat
20 familiar to you, because I know you served on a criminal
21 jury before; is that right?

22 A. Yeah. It was a drunk driving type situation.

23 Q. Okay. How long ago was that?

24 A. In my notes I think it was around '95. That's
25 approximate. It was a situation -- shall I elaborate?

1 Q. Sure.

2 A. The gentleman was conceding that he was -- was
3 conceding guilt. It was a deal where we had to assess
4 punishment and it was his fifth arrest for drunk driving,
5 fifth conviction, and apparently he had to have a jury to
6 get him off. There was mandatory jail time, if he didn't
7 have a jury, if I understood correctly.

8 Q. All right.

9 A. So he was hoping that the jury would allow him
10 back on the streets.

11 Q. You said that was back in '95?

12 A. It was in the mid '90's.

13 Q. Okay. Was that the only criminal case you
14 served on?

15 A. Only criminal case. I've been called a couple
16 of other times and come close, but --

17 Q. It looks like you were the foreman on that
18 case?

19 A. Yes, sir.

20 Q. Okay. What range of punishment did y'all have
21 or what were your options in that case?

22 A. The option was to let him walk or the outside
23 was two years in county jail or state jail -- county jail, I
24 think, at the time, and cash of maybe \$10,000. You would be
25 more knowledgeable about the limits on that. There was

1 options in there and we did assess some money and I believe
2 we gave him 18 months.

3 Q. Okay. And you were also on a civil jury more
4 recently; is that right?

5 A. Yes.

6 Q. Tell us about that.

7 A. That dealt with a car accident. One vehicle
8 struck another from the rear in some heavy traffic and there
9 was a physical injury, one of the drivers, that appeared
10 over time.

11 Q. Okay. And looks like y'all awarded about
12 roughly \$93,000?

13 A. Which was substantially what the -- what the
14 plaintiff was looking for in terms of his actual out of
15 pocket losses for hospital bills and lost wages.

16 Q. Okay. Did both of those deliberations go
17 pretty smoothly or were they long, drawn out any time or
18 anybody get angry or loud or vociferous?

19 A. No, there were, well, yeah. I think back to
20 the first one with the drunk driver. They were basically
21 wanting to hang the guy. We were a little more reasonable
22 about things. The more recent one was interesting to me
23 because there were a couple of people on the trial who
24 didn't remember on the second day what had occurred on the
25 first, which concerned me. But -- and they were really just

1 kind of wanting to get out quick, wanting to get to the bus
2 drive.

3 Q. Having had those experiences and being foreman
4 on both a civil and a criminal jury, do you have any
5 thoughts or hesitations or concerns maybe going into another
6 jury service in a death penalty case?

7 A. I can't imagine anybody wanting to.

8 Q. We probably wouldn't want anyone that wanted
9 to.

10 A. No.

11 Q. But I didn't know how those, being on those
12 two juries, how it might affect you or what kind of
13 impressions you walked away with about the system.

14 A. I've got a degree in political science. I
15 kind of understand what the system's about, but it was a
16 long time ago, too. I understand how it works and I
17 understand the necessity for it. And in my career I've had
18 to make a lot of judgments. I was building level school
19 principal for a long time, so you see little kids with the
20 same sort of problems as big people do, except it's not
21 quite as grave.

22 Q. Okay. Let me kind of just go over some of the
23 stuff in your questionnaire. I think you've got it in front
24 of you, maybe direct your attention to page 5. We kind of
25 gave you a series of statements and asked whether you

1 agreed, disagreed, things like that, with respect to
2 particular statements.

3 Almost the very bottom of page 5 we have
4 the statement, criminal laws treat criminal defendants too
5 harshly and you checked that you strongly agreed with that
6 statement. And I'm just kind of curious what your opinion
7 is or what led you to check that you strongly agreed with
8 that.

9 A. I think I misread it.

10 Q. Okay.

11 A. Well, I'm sure I did. Criminal laws treat
12 criminal defendants too harshly. No, I misread that.

13 Q. Okay. Would you have strongly disagreed or
14 where would you have come down on that?

15 A. All right. I'll elaborate. Probably disagree
16 in that instance, not necessarily strongly disagree. I
17 think there's situations with every -- every situation is
18 unique and has its own characteristics and the law has to be
19 written, its nature, to cover all situations. So that's why
20 there's a jury.

21 Q. Okay. Now you have told us, I guess in a
22 general sense or philosophically, at least, that you agree
23 with the death penalty; is that right?

24 A. Generally, yes.

25 Q. Okay. What purpose do you think it serves in

1 society or why do you think we should have it available as
2 an option?

3 A. I know a lot of people think it's a deterrent.
4 I don't know that it's a deterrent for some. God in heaven
5 knows why some people don't commit a crime. It may be a
6 deterrent because we'll never know about the cases that
7 don't occur. As a citizen I want some assurance that a
8 person who commits a violent crime upon another isn't going
9 to have an opportunity to do it again. And that may or may
10 not involve the death penalty. If you've got assurances
11 that the guy is going to be put away where he can't get out
12 and perform crime on others, maybe that's best alternative.

13 Q. Just looking through your statement, it looked
14 like maybe parole would be a concern to you or I think you
15 call it the early release system?

16 A. My problem is, yeah, people commit crimes and
17 maybe they are sentenced to 10 or 20 years and they get out
18 in short terms. And not, certainly not a good many of these
19 people wind up committing other crimes. And had they served
20 the full term, they wouldn't have been out available to
21 commit that crime.

22 Q. Do you think maybe knowing that some people or
23 some jurors are more likely to assess a death sentence
24 because they are worried about the person getting back out
25 on the street?

1 A. I would hope that that wouldn't be the cause
2 for it. I would hope that with the death sentence, yes,
3 there's probably a fraction of it there, but I think it's
4 society's statement towards that individual that the crime
5 committed was so grievous and heinous against the community
6 that it cannot possibly be tolerated nor can anybody else be
7 tolerated in this situation.

8 Q. Okay. What types of crimes come to mind when
9 you think about an appropriate case for the death penalty?

10 A. A situation in which it's obviously
11 premeditated, they thought out what they're going to do.
12 Without bringing up any specifics, you might have a parent
13 who kills children and does it having thought out, having
14 worked out the details of when to do it, how to do it, what
15 to do later. That's particularly heinous.

16 Q. I know premeditation is important to a lot of
17 people we talk to. It sounds like it's important to you.

18 A. Yes.

19 Q. Would you just reserve the death penalty for
20 those types of premeditated crimes?

21 A. No. I think in the sense that if you
22 sometimes anticipate, if you know you're walking into a
23 situation and something is likely to happen, as a rational
24 adult you should anticipate various options of occurrences.
25 And a reasonable person should anticipate that if you, if

1 you're armed or if you do something to another person,
2 something could happen.

3 Q. Okay. Let me ask you this. You make the
4 statement on the first page of your questionnaire, you
5 believe there are some crimes there are deserving to protect
6 society, but I'm also aware there have been innocent
7 defendants who were later exonerated and the death penalty
8 must meet a very high standard. And we hear that from a lot
9 of the jurors.

10 Obviously, they want that high comfort
11 level before, I guess, the ultimate penalty is imposed. And
12 I guess, you may know this, I guess to a certain extent,
13 even our Supreme Court kind of treats death cases or death
14 penalty cases different. You know, they acknowledge the
15 difference between a regular criminal case. And I'm just
16 curious when you said hold us to a very high standard, what
17 did you have in mind?

18 A. Well, back in May I suppose the situation in
19 Illinois was on my mind when I was filling this out, which
20 -- how many? A large number of people were exonerated
21 because of DNA evidence. A lot of people were on death row
22 in the State of Illinois based upon circumstantial evidence,
23 eyewitnesses, and that sort of evidence which may or may not
24 be accurate. And upon scientific proof they were proven not
25 to be at the scene or they didn't commit the crime, anyway.

1 It would bother me terribly as a citizen
2 if I knew if we executed a prisoner and later it was
3 determined that he, in fact, was innocent of the crime
4 accused. There's no fixing it. If you've got him in a jail
5 cell for 20 or 30 or 40 years and you later determine he was
6 innocent of the crime accused, he's lost an awful lot of
7 time and much of his life, but he still can breathe and
8 that's an out for him.

9 It beats the death penalty in that
10 situation. Death penalty is a good punishment for black and
11 white, cut and dry. You know for sure you've got the right
12 person.

13 Q. Let me ask you this. You know, again, we talk
14 to a lot of people and hear a lot of different things and I
15 think we all acknowledge when you're dealing with the death
16 penalty case, it's a little different. As you probably
17 recall, the burden of proof in your civil case was a, you
18 know, preponderance, 51 percent of the evidence. In a
19 criminal case you heard DWI is beyond a reasonable doubt.
20 And actually, that's the standard in this case, beyond a
21 reasonable doubt.

22 But we talked to a lot of people, again,
23 and kind of following along the lines that death is
24 different, the death penalty is different, and just for me
25 personally to assess that death penalty, you know, I can't

1 have any doubt, reasonable or not reasonable. You know, I
2 just want to feel better about it than I would in a normal
3 standard, a normal case. It should be higher, that type
4 thing. Does that make sense to you?

5 A. Yes.

6 Q. Okay. How do you come down on that?

7 A. I tend to agree with that. It's, once again,
8 if there was an error in the prosecution, an error in the
9 defense, something was overlooked, if there's room for an
10 appeal later and maybe it could be reintroduced, maybe it
11 can't be. But if the death penalty is performed, there's no
12 more appeals after that point. There's no fixing that.

13 Q. Sounds like you, like so many people we talk
14 to, would just, you know, not want any doubt, I guess,
15 reasonable or otherwise, before they actually impose the
16 ultimate penalty?

17 A. Well, there's probably going to be a
18 percentage of doubt beyond a reasonable doubt and I suppose
19 the definition of reasonable has to come into play.

20 Q. Well, we actually don't have one in Texas. We
21 just leave it up to the jury's good common sense. I just
22 want to make sure, obviously, from our perspective, we talk
23 to a lot of jurors that very frankly hold us to a higher
24 burden in a case like this, a death penalty case, because so
25 much is at stake, and they think it should be treated a

1 little bit differently than all the rest of the criminal
2 cases. And they tell us, very frankly, I want to hold you
3 to the highest standard there is, something beyond beyond a
4 reasonable doubt.

5 A. Well, in the DA's Office I would hope that you
6 would hold yourselves to a very high standard on a DWI case
7 in the same sense you have a capital murder case. Maybe it
8 doesn't at times, but I would hope so.

9 Q. Do you think in your heart of hearts you might
10 hold us to that higher standard?

11 A. Well, I'd hold you to a high standard, yes.
12 Would I expect the prosecution in a case like this to do the
13 best job possible? You bet. Would I expect the defense to
14 do the best possible job? You bet.

15 Q. Are you going to hold us to a higher standard?

16 A. Higher standard, not to a higher standard, to
17 a very high standard. Does that make sense?

18 Q. Somewhat, I guess. We'll just move on to
19 another issue. Let me ask you this. A lot of times in
20 these capital murder cases we get in situations where we
21 talk about people, for lack of a better term, triggermen
22 versus non-triggermen, or accomplices. You know, the law
23 allows us to actively or to prosecute every person who was
24 actively involved in a crime, whether it be shoplifting,
25 whether it be a capital murder.

1 And when you're talking about the capital
2 murder context, you may have a situation where you have a
3 group of people and only one of the people actually pulled
4 the trigger, actually caused the death. The rest can be
5 considered nontriggerman accomplices. We call them parties
6 in Texas. But I think most people know them as accomplices.

7 And there are a lot of people who are
8 strongly in favor of the death penalty, but in cases such as
9 that where they have nontriggermen accomplices, they start
10 drawing some lines. You know, they may be strongly in favor
11 of the death penalty for the person that actually caused the
12 death. But if it were up to them, they would kind of take
13 the death penalty off the table for the accomplice. They
14 may want to lock him up for a long time, lock him up for
15 life.

16 But they simply don't believe, for
17 whatever reason, religious, moral, or ethical, that the
18 death penalty would be justified for an accomplice, a person
19 that didn't take the life. I'm curious where you come down
20 on that.

21 A. That's something we have to lose sleep over, I
22 suppose. If the accomplices, I'm assuming we have one
23 triggerman and everybody else in the group is an accomplice,
24 it's an arbitrary situation. If all of the accomplices knew
25 up front that the intent was for the triggerman to commit

1 the crime to kill somebody or to wound somebody and they
2 went along with it, knowing that that was the situation,
3 then they are probably just as guilty as the person who
4 pulled the trigger, because they had an opportunity to stop
5 the activity before it occurred.

6 Q. Okay. What about the death penalty for those
7 people?

8 A. Well, as I say, if they're just as guilty as
9 the triggerman in that situation, then the death penalty
10 would probably apply to them as well, because they had an
11 opportunity to stop it.

12 Even if somebody has already committed
13 another crime, let us say drunk driving or something, and
14 something else comes up, everybody has a conscience and
15 everybody has a moral line in the sand. And you might -- it
16 might be okay for one guy to rob a liquor store, but he's
17 not going to attempt to kill the liquor store owner.

18 There's a difference there. And he might
19 be with somebody else who says I'm going to go in and kill
20 the liquor store owner and this other fellow says, I'm not
21 up to that, fellow. I'm going to walk.

22 Q. Okay. Let me ask you, since we're kind of
23 moving along from the death penalty, let me ask you about
24 this case in particular. You, like just about everybody
25 we've talked to, indicate they have heard something about

1 this particular case.

2 A. Oh, yeah.

3 Q. And, you know, it was hard to miss there for a
4 while.

5 A. It's in the news.

6 Q. A high profile case. And I'm just curious
7 what you've heard about this case.

8 A. All the particulars, or --

9 Q. Yes, sir.

10 A. Well, okay. Firstly, when I look at the news,
11 I just understand that it's the news and it's from a
12 particular perspective and it may or may not be factual.
13 And having worked for a government agency, I'm aware that
14 things are said in the news that bear little or no
15 resemblance to fact.

16 But the situation, as I understand, was a
17 group of guys had escaped from the state prison and had
18 stolen vehicles and weapons and made it to Irving where they
19 held up the store at gunpoint for whatever it was, cash,
20 more weapons, whatever it is they were looking for. And
21 sometime during the evening or during the events, whether an
22 officer had been called or just happened to be there, he was
23 killed by one or more of the prison escapees.

24 Q. Okay. Did you keep up with the manhunt or --

25 A. Yes, sort of, in that it got to Colorado and

1 my inlaws are retirees in Colorado Springs, so I have a
2 mental picture of what goes on. And I used to go fishing
3 with my father-in-law up on Highway 24 beyond where they
4 were caught. So when that happened, I've been by there.

5 Q. Yeah.

6 A. But it's like, it's a bit surreal.

7 Q. Have you followed any of the subsequent court
8 proceedings?

9 A. No. You hear it in the news somebody has been
10 convicted and sentenced and that's the sum of it.

11 Q. To be very frank with you, you probably know
12 more about this than most people we talk to, and, you know,
13 we never know how that's going to affect a potential juror.
14 We just kind of leave it up to the juror to be honest with
15 us and look in their heart of hearts and really kind of rely
16 on them to be honest one way or another whether this would
17 actually affect you, if you were to serve as a juror in this
18 case, knowing what you know or maybe being able to conjure
19 up that mental image of Highway 24 in Colorado.

20 A. Well, that's after the fact, though. Is this
21 case going to deal with all that stuff or is it primarily
22 the thing in Irving?

23 Q. I would expect you'd hear complete evidence on
24 everything.

25 A. The whole thing? I don't perceive that it's

1 an issue. It's no worse than somebody in Dallas County
2 living in Irving and having driven past the store where the
3 other portion of the crime was committed.

4 Q. Okay. So you think you could base your
5 verdict just on the evidence that you hear in the courtroom?

6 A. I'm quite sure I could. I'm not really
7 volunteering for this by any stretch, but I have dealt with
8 these kinds of things through my career.

9 Q. With death penalty cases?

10 A. No, no, no, just dealing with children and
11 problems, who beat up who, and who stole this from who, and
12 that sort of silliness and -- but it's not --

13 Q. Okay. Well, I guess this is a little bit more
14 than silliness.

15 A. Oh, yeah, this is quite different. This is
16 serious.

17 Q. Okay. Give me just a second, I think that's
18 all I have. That's all I have, Mr. Danaher. Thank you.

19 A. Thank you.

20 MR. WIRSKYE: I think we have an
21 agreement, Your Honor.

22 MS. BUSBEE: Yes, we do, Your Honor.

23 THE COURT: Dr. Danaher, I appreciate you
24 coming down today. The parties have agreed to excuse you
25 from this jury service and so thank you and you're free to

1 go.

2 [Prospective juror out]

3 [End of Volume]

1 STATE OF TEXAS *

2 COUNTY OF DALLAS *

3 I, NANCY BREWER, Official Court Reporter for the 283rd
4 Judicial District Court, do hereby certify that the above
5 and foregoing constitutes a true and correct transcription
6 of all portions of evidence and other proceedings requested
7 in writing by counsel for the parties to be included in this
8 volume of the Reporter's Record, in the above-styled and
9 numbered cause, all of which occurred in open court or in
10 chambers and were reported by me.

11 WITNESS MY OFFICIAL HAND on this the 4 day of

12 March, 2004.

13
14
15 Nancy Brewer
16 NANCY BREWER, CSR, NO. 5759
17 Expiration Date: 12-31-04
18 Official Reporter, 283rd JDC
19 Frank Crowley Crts. Bldg. LB33
20 133 No. Industrial Blvd.
21 Dallas, TX 75207
22 (214) 653-5863
23
24
25

REPORTER'S RECORD

74851

VOLUME 22 OF 61 VOLUMES

TRIAL COURT CAUSE NO. F01-00328-T

STATE OF TEXAS * IN THE DISTRICT COURT
VS. * DALLAS COUNTY, TEXAS
PATRICK HENRY MURPHY, JR. * 283RD DISTRICT COURT

INDIVIDUAL VOIR DIRE

FILED IN
COURT OF CRIMINAL APPEALS

MAR 9 - 2004

Troy C. Bennett, Jr., Clerk

On the 25th day of September 2003, the following
proceedings came on to be heard in the above-entitled and
numbered cause before the Honorable Vickers L. Cunningham,
Sr., Judge Presiding, held in Dallas, Dallas County, Texas.

Proceedings reported by machine shorthand.

ORIGINAL

A P P E A R A N C E S

APPEARING FOR THE STATE

Mr. Toby Shook
SBOT NO. 18293250
And
Mr. Bill Wirskye
SBOT NO. 00788696
Assistant District Attorneys
133 No. Industrial Blvd.
Dallas, Texas 75207
Phone: 214/653-3600

APPEARING FOR THE DEFENDANT

Ms. Brook Busbee
Attorney at Law
SBOT: 03488000
703 McKinney Ave. Ste. 312
Dallas, TX 75202
214/754-9090

Mr. Juan Sanchez
Attorney at Law
SBOT: 00791599
5630 Yale Blvd.
Dallas, TX 75206
214/365-0700

PROSPECTIVE JUROR INDEX

<u>JUROR</u>	<u>CRT.</u>	<u>STATE</u>	<u>DEFENSE</u>	<u>VOL.</u>
Susan Braley	4	5		22
Scott Mattinely	25	26	38	22
Judy Liston	48	45	89	22
Walter Thomas	103	104	138	22
Bradley Versteeg	144	145		22

P R O C E E D I N G S

THE COURT: Ask Ms. Braley to come in.

[Prospective juror in]

THE COURT: Good morning.

PROSPECTIVE JUROR: Hi.

THE COURT: We have juror No. 2231, Ms. Susan K. Braley; is that correct? Welcome to the 283rd. Thank you for being here early this morning and I take the first one in, so you were the first one in this morning.

PROSPECTIVE JUROR: I was?

THE COURT: Yes, ma'am. I appreciate you being here early, so we can get you in and get you on the program. Have you had enough time to review the guide I provided for you?

PROSPECTIVE JUROR: Yes.

THE COURT: I also provided a copy of your questionnaire to refresh your memory on what you looked at back in May. As I said in my guide, there are no wrong answers, just honest ones.

PROSPECTIVE JUROR: Okay.

THE COURT: People come in a little nervous, don't know what to expect. It can be intimidating. This is as informal a process as we can manage. It's a whole lot better than having 700 people out in the auditorium where it's all full and hot and bothered. So

1 this is an opportunity for the attorneys to visit with you,
2 try to help you understand how the law relates. It's
3 complicated, so you've got to figure out how it all works
4 together.

5 At the end of the process I have two
6 questions I must ask. One, is do you understand the law?
7 Two, can you follow the law? That's the big picture for me.
8 Only question I have for you before we begin is will you be
9 able to serve this Court for a period of two weeks,
10 beginning on November 10th?

11 PROSPECTIVE JUROR: As far as I know it
12 will be fine.

13 THE COURT: Nobody has a crystal ball.
14 Thank you very much. Mr. Shook, would you like to inquire?

15 MR. SHOOK: Yes, Judge.

16 SUSAN BRALEY,
17 having been duly sworn, was examined and testified as
18 follows:

19 DIRECT EXAMINATION

20 BY MR. SHOOK:

21 Q. Ms. Braley, my name is Toby Shook. I'm going
22 to ask you questions on behalf of the State and, as the
23 Judge said, there aren't any right or wrong answers. We
24 just want your honest opinions.

25 A. Okay.

1 Q. I'm going to go over some of the things in
2 your questionnaire and follow up on that and then we'll talk
3 about capital murder, how you feel about that, and some of
4 the rules and laws that apply to these types of cases.

5 A. Okay.

6 Q. And looking at your questionnaire I know you
7 are the assistant to the CFO; is that right?

8 A. Uh-huh.

9 THE COURT: I'm sorry, ma'am, you've got
10 to say yes. She records everything we're saying.

11 PROSPECTIVE JUROR: Yes, I forgot. Yes.

12 Q. (By Mr. Shook) For Board for Expanded
13 Learning. What kind of company is that? Kind of tell us
14 what you do on a day-to-day basis.

15 A. It's an education company. We develop reading
16 programs for struggling readers and sell them to public
17 sectors.

18 Q. Okay. And in reviewing your questionnaire, I
19 saw -- we always look to see if you've had any prior jury
20 service. It looked like you had been on some type of civil
21 case; is that right?

22 A. Yes.

23 Q. What do you recall about that case?

24 A. Not that much. Someone had been injured in a
25 car wreck and they were suing and we all agreed to pay him

1 for his medical bills, but nothing further.

2 Q. Okay. And you said everyone pretty much
3 agreed. It wasn't any great controversies back there or
4 anything like that?

5 A. No. It was a real quick deliberation and
6 decision.

7 Q. Okay. And then another area I wanted to talk
8 to you about is we always ask if you've known anyone that's
9 been through the criminal justice system and it looked like
10 you had a nephew, as well as a son-in-law and a niece, that
11 had had some type of problem.

12 A. Correct.

13 Q. And the nephew looked like got some type of
14 probation?

15 A. Yes.

16 Q. What did that involve, if you know?

17 A. From what I know, he's in Houston, not here.
18 From what I know he had gotten, he and some kids had gotten
19 a videotape and they were with some friends and some girls
20 had flashed the camera and then they took the video and were
21 passing it around and making copies and he got in trouble
22 for that.

23 Q. Okay. Okay. And then the son-in-law had some
24 type of hot check case?

25 A. Yes. That was, of course, before he was my

1 son-in-law, it was years ago. But I just know about, not
2 exactly, he just, and that was, you know, he got probation.

3 Q. And then the niece was accused of some type of
4 bullying?

5 A. Yes, that was -- and that got dropped. That
6 was just really kidstuff. They say her and a girl didn't
7 like each other and she took a -- I guess they had been
8 calling each other and she told her to leave her alone and
9 she was going to, you know, threatened her in some way like
10 she was going to beat her up and she turned it in to the
11 police. It was --

12 Q. Okay. So nothing, it doesn't sound like any
13 of those were too serious?

14 A. No.

15 Q. Okay. It wouldn't affect you one way or
16 another as a juror, I wouldn't think.

17 A. No, uh-huh.

18 Q. Okay. Let's talk for a minute about capital
19 murder in general. You put on the questionnaire that you
20 are in favor of it as a law. And I'd like to ask you how
21 you feel about it as a law. If you are in favor of it, why
22 you think we need it and the purpose it serves society.

23 A. Yes, I am in favor. Well, as a punishment for
24 people who commit crimes of capital murder, I think it's
25 appropriate. And I think it's a deterrent. And I think

1 it's important for the person to be punished for that crime.

2 Q. Okay. What types of cases from your personal
3 point of view do you think should at least come into
4 consideration for the death penalty?

5 A. Um, well, racial killing, random killing,
6 where it's just, you know, not a crime of passion or someone
7 they know or some extenuating something. It's just killing
8 someone.

9 Q. Stranger on stranger?

10 A. Right. Just where, you know, someone goes
11 into Taco Bell and kills someone or someone kills an
12 officer, or --

13 Q. Okay. Have you always been for the death
14 penalty since you were an adult?

15 A. Yes.

16 Q. Has there been any one event that caused you
17 to feel that way or is it something you just formed an
18 opinion as growing up?

19 A. Just formed that opinion.

20 Q. Okay. Have there been any cases that you
21 followed, either locally or nationally in the media, that
22 you thought were death penalty type cases or any cases that
23 caught your interest involving the death penalty?

24 A. Not really. You know, I've seen cases like O.
25 J., you know, all the big media cases, you know. The lady

1 where she drowned her kids, you know, all those kind of
2 cases. You just can't help but see them on the TV. I saw
3 this case on the TV.

4 Q. Okay. Yeah, we'll talk about that, then,
5 because everyone has probably seen a little bit of this case
6 because it did get a lot of publicity when it occurred.

7 A. Right.

8 Q. On the radio, TV, and newspapers. What do you
9 recall seeing or hearing about this case?

10 A. What I recall is that some people broke out of
11 prison. Somehow they were in Dallas, something about
12 robbery, an officer was killed, and they were caught in
13 Colorado.

14 Q. Okay. Did you follow the cases after they
15 were caught at all? Any subsequent court proceedings,
16 anything like that?

17 A. No.

18 Q. Okay. Just because you have seen something,
19 doesn't make you ineligible to be a juror. The rule is you
20 can't let any newspaper reports or TV shows that you've seen
21 influence you in your opinions on the case. You have to
22 just base your decisions on what you hear in the courtroom.

23 We can't expect you to forget what you've
24 seen, but we just have to ask you to have that mental
25 discipline to decide the case based on the facts that are

1 brought forth in the courtroom from the witnesses. Do you
2 feel you'd be able to do that?

3 A. I guess so, yes.

4 Q. Okay. It just comes down to as best you know
5 yourself. Obviously, I think you see the common sense point
6 of view is the newspaper stories, the TV interviews, or
7 reports, may not be that accurate and more accurate
8 information is going to come from what is produced in the
9 courtroom.

10 A. Yes, I understand that.

11 Q. Okay. And so would you have any problem
12 following that rule and just deciding the case based on the
13 evidence you hear in the courtroom?

14 A. No.

15 Q. Okay. If it were up to you would you reserve
16 the death penalty or at least have it for consideration for
17 any other crimes other than murder?

18 A. Nothing that I can think of I would think
19 would be applicable.

20 Q. Okay. So it would be the types of murders you
21 talk about is when it comes under review. In Texas there's
22 only, that's what the death penalty encompasses, it's only
23 murder cases and then only certain types of murder cases.
24 It's an intentional killing without justification, nothing
25 done in self-defense, not an accident. But you have to have

1 murder, plus another aggravating fact, such as murder that
2 occurs during the course of another felony.

3 Examples would be a murder that occurs
4 during a robbery. Someone goes into a convenience store and
5 shoots the clerk while robbing it. That could be a death
6 penalty case. Murder that occurs during a burglary, someone
7 breaks into someone's home and kills someone in the house.
8 That could be a death penalty case.

9 Murder during a rape, obviously,
10 kidnapping or arson, also murder of specific individuals,
11 such as police officers, firemen on duty, a child under the
12 age of six would qualify. Murder of more than one victim
13 like a serial killer situation or a mass murder situation.
14 And then murder for hire, someone does it for money or
15 profit.

16 A. Okay.

17 Q. But those are the specific situations that
18 have been reserved for consideration of the death penalty.
19 As far as that list goes, are those the types of cases you
20 feel should come under consideration?

21 A. Yes.

22 Q. Okay. When we talk about the -- any crime,
23 but in particular capital murder, it's always natural to
24 think of an example in our head such as the convenience
25 store killing I brought up. And we naturally think of the

1 actual triggerman committing the crime.

2 However, capital murder, like any crime,
3 might have more than one person. You might have accomplices
4 that help carry out a crime, some having greater roles than
5 others. There might be several accomplices. And under the
6 law if you are assisting in a crime as an accomplice, you
7 can be prosecuted and found guilty of that particular crime.
8 And this is true for capital murder, too.

9 Some people feel, and we want to ask the
10 jurors' natural reaction to that, because as far as the
11 death penalty goes, we have many people that tell us they
12 are in favor of the death penalty and feel individuals that
13 actually pull the trigger or cause the death, the actual
14 murderer, should be prosecuted for the death penalty and can
15 receive it, depending on the facts. But if they have an
16 accomplice who is just helping them commit the crime,
17 someone that is assisting, that they should not get the
18 death penalty.

19 The law says that they may under certain
20 circumstances, but some people draw a line. They might
21 reserve that penalty, you know, a long prison term for an
22 accomplice, but they, from their personal, moral point of
23 view, don't feel it's quite fair to prosecute someone for
24 capital murder or for them to receive the death penalty, if
25 they didn't actually murder the individual. They reserve

1 that just for the actual triggerman. And jurors feel
2 differently about that. How do you feel about that
3 particular area of the law?

4 A. I haven't really thought about it, but I guess
5 depending on if they could show that he was participating
6 and it was a joint thing, I would think that you could
7 consider that.

8 Q. Okay. That has a lot to do with it.
9 Obviously, we can't preview the facts, but the law says, if
10 someone is actively participating in the crime, that they
11 can be found guilty and ultimately receive the death
12 penalty.

13 An example I give to demonstrate the law
14 is let's say Mr. Wirskye and I, we want to rob the bank down
15 the street. Our plan calls for me to have a gun. He's got
16 a big bag and we go in there and I pull the gun out and
17 threaten everyone. And while their hands are in the air, he
18 starts ransacking all the cash drawers.

19 During the middle of that I shoot one of
20 the tellers intentionally. I don't like the way they're
21 looking at me or he may say they may be going for an alarm,
22 so I shoot them to prevent them from doing that. We leave
23 and we're caught.

24 Obviously, I could be prosecuted for
25 capital murder. I could receive the death penalty,

1 depending on what the jury decides. But the law says
2 Mr. Wirskye could also be prosecuted for capital murder,
3 even though he didn't have anything to do with shooting. He
4 was there helping me, actively participating in that. From
5 your own personal point of view, do you think, then, it's
6 fair that the law, that we could prosecute Mr. Wirskye for
7 capital murder?

8 A. I think it's fair that you could prosecute him
9 for it, but I think that naturally, as a jury, you would
10 take into consideration that he didn't actually kill that
11 person.

12 Q. Right. And that goes back to my original
13 point, because some jurors will say maybe prosecute him, but
14 as far as a penalty goes, the death penalty would be off the
15 table for me. I would reserve that for the triggerman.
16 Life sentence, 99 years, 50 years maybe for someone that's
17 helping, a bank robbery conviction, but not a death sentence
18 in those situations. Other jurors tell us they may do that,
19 you know, depending on the participation.

20 A. I think after hearing the evidence, if you
21 felt like he was much of a participant and it was his
22 intent, too, then I guess you would just have to decide at
23 that point. But I do, you know, he didn't commit the
24 murder, so I guess there is a difference in my mind.

25 Q. Okay. Would it be such a difference that from

1 your own personal point of view, you don't think a death
2 sentence should be imposed on parties? That's what we call
3 them, parties or accomplices, in these situations?

4 A. No.

5 Q. Okay. It would just depend on the facts?

6 A. Right.

7 Q. You brought up the word "intent," and let me
8 go over one of the theories we can prosecute the case under.
9 It's called conspiracy. The law says that if one or more
10 persons enter into a conspiracy to commit one crime, and one
11 of the conspirators commits a different felony in order to
12 further the conspiracy, they can all be held responsible,
13 even though they didn't intend for that other crime to
14 occur, if a jury believes they should have anticipated that
15 could happen. Now, in our situation a conspiracy is simply
16 our agreement to commit bank robbery.

17 A. Uh-huh.

18 Q. And during the course of that bank robbery, I
19 committed this capital murder by shooting the teller to
20 further that bank robbery. The law says that Mr. Wirskye
21 could be found guilty, even though he didn't intend for that
22 to happen, didn't want that to happen. But the facts show
23 he should have anticipated that could happen.

24 In other words, to even get him guilty of
25 capital murder, he doesn't have the intent for that person

1 to die. But if the facts show, well, you should have
2 anticipated that could happen, you can be found guilty under
3 the law.

4 And some people have a problem with that
5 aspect, you know. Their key on an accomplice would be, I
6 think you can convict someone of capital murder, if they're
7 not the triggerman, if that was their true intention, they
8 wanted that person to die, that sort of thing. But under
9 the conspiracy law we don't even have to prove that
10 intention to get a guilty verdict. And sometimes we have
11 jurors go, well, from my personal point of view, I disagree
12 with that particular area. How do you feel about that?

13 A. I could see that point, because if you're
14 going in some place, robbing some place, and you have a gun
15 that's loaded --

16 Q. Okay. Then you could see where someone could
17 be convicted, even though they didn't have the intention?

18 A. Yeah. If I walked in some place and had a gun
19 loaded and I was robbing someone, then something can happen.

20 Q. Okay. So you can see areas where, even if
21 someone didn't have the intent, necessarily, or wasn't
22 urging, that they could be found guilty of capital murder?

23 A. Yes.

24 Q. Okay. The trial in a capital murder case
25 is divided into two parts. There's the guilt/innocence

1 stage and then the punishment stage. Guilt/innocence stage,
2 we have to prove that indictment to you beyond a reasonable
3 doubt. If we fail to do that, obviously, it's a not guilty
4 finding. But if we do, then we go on to the punishment
5 phase where you may hear additional evidence. And at the
6 close of that evidence, you get these Special Issues, which
7 we'll go over more in a minute.

8 But basically what the State has to do is
9 prove to you beyond a reasonable doubt that the defendant
10 would be a continuing danger to society, that he did
11 anticipate a life would be taken, and thirdly, that there is
12 not sufficient mitigating evidence to warrant a life
13 sentence.

14 If the questions are answered yes,
15 yes, and no. The Judge has no discretion. He would
16 sentence the defendant to death. The jury doesn't actually
17 write death or life in their verdict form, but they answer
18 those questions and the Judge sentences according to how
19 they answer them. If they're answered any other way, other
20 than the yes, yes, and no, then he would sentence the
21 defendant to life.

22 But those are the only two possible
23 outcomes, a death or life sentence, once someone's been
24 found guilty. The procedures are the same in each case.
25 Are you familiar with the method of execution in Texas?

1 A. Um, no.

2 Q. Okay. It's by lethal injection. And from
3 living here you probably are aware that the death penalty is
4 actually carried out.

5 A. You mean that we have death penalties carried
6 out in Texas?

7 Q. Right.

8 A. Yes.

9 Q. You may have followed those in the news.

10 A. I can't think of one, but I'm sure I've seen
11 something, yes.

12 Q. Texas actually leads the nation in executions.
13 Almost every year Texas leads all states in executions.
14 There have been probably close to 20 executions this year
15 alone.

16 The procedures are the same in each
17 case. They'd be the same in this case, if the defendant
18 were found guilty and those questions were answered in a
19 yes, yes, no. The defendant would be placed on death row.
20 I can't tell you when, but at some point in time the Judge
21 would actually give him an execution date. The day before
22 that date he would be taken off death row and put in
23 downtown Huntsville where there's an old prison where all
24 executions take place by law.

25 On the date of his execution he's given

1 time with family members, if he desires, religious person of
2 his choosing. He's given a last meal, if he can eat it or
3 chooses to eat it. But at 6:00 p.m. all executions take
4 place.

5 The procedures are the same in each case.
6 He would be taken shortly before 6:00 p.m. into the
7 execution chamber, put on a gurney which is constructed of
8 leather straps, secured on that gurney, and needles are
9 placed in his arm. After that is in place, witnesses are
10 brought in from the victim's side as well as the defendant's
11 side in separate rooms.

12 The warden is there and he's given an
13 opportunity to make a last statement, and that's often
14 covered in the news. You may have read that at some point
15 in time. They usually kind of make a big deal about that.
16 The person may ask for forgiveness. He may proclaim his
17 innocence. You often have quotes from family members, that
18 sort of thing.

19 But after that statement is made, the
20 warden simply signals the executioner who then injects
21 lethal substances which act quickly upon the body. They
22 collapse the lungs which forces the air out, stops the
23 heart, and within about 15 seconds he will lapse into a
24 coma. Death occurs soon after that. That's the method
25 that's been used in every execution so far in Texas since

1 1976 and it would be used in this case.

2 It's one thing to talk about the death
3 penalty, kind of philosophically with your friends or family
4 or filling out a questionnaire here and then coming down,
5 and then once you start going through this process, it
6 becomes kind of a different situation we found with jurors,
7 because the seriousness of the situation sets in. And I
8 don't mean to be morbid to go into detail, but we want every
9 juror to realize what's about to happen, because this case
10 isn't for everyone. That's why we brought about a thousand
11 people down.

12 Some people are against the death penalty
13 totally and that's fine. They tell us that, they're honest
14 with us and we send them on their way. They'll come down on
15 another case. We have a few that are for it all the time
16 and they can't be fair. We have others that are for it and
17 feel they can sit and make these decisions.

18 We have others that philosophically are
19 for it, think it should be used, but, quite frankly, once
20 they sit down and start thinking about it, it would weigh
21 too much on their conscience to make a decision which would
22 end in another human being's life. And if they feel that
23 way and are honest about it, that's fine, too. We don't
24 force them on the jury, either.

25 But this is the opportunity we use to

1 talk to each juror individually how they personally feel,
2 because we can't preview the facts and you certainly haven't
3 been in a situation like this before, we know that. But
4 upon all the reflection you've given it, I know you believe
5 in it as a law.

6 Do you feel you're the type of person
7 who, if you sit on the jury and we prove these things to you
8 the way we believe we will, that you can actually take pen
9 in hand and answer the questions in a way knowing that this
10 man at the end of the table will be executed some day in the
11 method I described?

12 A. It's very difficult. I mean, it's not
13 something someone would want to do, but yes, I do think I
14 could.

15 Q. Okay. And what is it, why do you believe you
16 could do it?

17 A. Well, that's a lot for someone who, I mean, if
18 someone committed capital murder and was proven, it's a lot
19 lighter death than -- I've had relatives die of cancer that
20 have suffered tremendously and haven't gotten to have that.
21 So, I mean, it's, you know, in comparison I've seen people
22 suffer a lot more during their death than what you
23 described.

24 Q. Okay. So in a way you think it wouldn't be
25 that bad of a death, actually?

1 A. Well, I mean, I don't relish it or think it's,
2 you know, sounds good. But I'm just saying, you know,
3 seeing my uncle suffer with bone cancer and it was horrible.
4 I would have loved for him to be able to be put out of his
5 suffering, so.

6 Q. We've had people tell us that. And as far as
7 you know from your own point of view, then, you could make
8 that decision?

9 A. I've never been put in that position, but
10 that's my --

11 Q. As best you know yourself?

12 A. That's my feeling on it.

13 Q. Okay. You put in the questionnaire at one
14 point, I want to get into another area, that we make a
15 statement that most criminals are actually victims of
16 society's problems, and we ask people if they agree,
17 disagree, or are uncertain, and you put uncertain on that.
18 And people put, they answer it differently for different
19 reasons, and if you would kind of follow up on us with that.

20 A. Well, I don't really know any criminals, so I
21 don't really know. I haven't been involved in the justice
22 system, so that I really know or studied that in any way.
23 So, you know, I assume that there's reasons such as, you
24 know, maybe a bad upbringing or drugs or maybe mental
25 problems. I don't really know. But it's just not something

1 I've ever really paid that much attention to personally.

2 Q. You brought up bad upbringing, because that
3 comes up in these Special Issues. The last question is the
4 mitigation question that we look at. You don't get to it
5 unless the defendant has been found guilty and it's already
6 been proven that you think he's a continuing danger and that
7 he anticipated that a life would be taken. But then you get
8 to review all the facts of the person, their life, and
9 decide if you think there is sufficient mitigating evidence.

10 And mitigating evidence could be
11 anything. Sometimes that's brought up, a bad upbringing,
12 maybe a broken home or they were physically or mentally
13 abused, that sort of thing. And jurors look at that. But
14 jurors feel differently about it. Some think it could
15 really be potentially mitigating and others really don't.

16 Do you have any thoughts or feelings
17 about that type of background evidence and how you might
18 view that?

19 A. Well, I do think that your upbringing does
20 have something to do with the kind of person you are, so I
21 do think it can change, set your course for life. I do
22 think that, if that's what you're asking. Now, I think
23 there's other people who rise above that background and make
24 their own way in life.

25 Q. Okay.

1 MR. SHOOK: May I have just one moment,
2 Judge?

3 THE COURT: Go ahead.

4 MR. SHOOK: Judge, can we approach the
5 bench for a moment?

6 THE COURT: You may.

7 [Bench conference]

8 MR. SHOOK: I'll pass the witness, Judge.

9 MS. BUSBEE: No questions, Your Honor.
10 We have reached an agreement.

11 THE COURT: Ms. Braley, I need to inform
12 you that the parties have agreed to excuse you and you shall
13 not serve on the jury. Thank you so much for coming down.

14 [Prospective juror out]

15 THE COURT: Mr. Mattinely.

16 [Prospective juror in]

17 THE COURT: Good morning. We have juror
18 No. 2197, Mr. Scott Allen Mattinely, is that pronounced
19 correctly?

20 PROSPECTIVE JUROR: Yes.

21 THE COURT: Welcome to the 283rd. Have
22 you had an opportunity this morning to review the guide I
23 provided for you?

24 PROSPECTIVE JUROR: Yes, I did read it.

25 THE COURT: A lot of law to give someone

1 first thing in the morning. We don't expect you to
2 understand it completely. I also provided a copy of your
3 questionnaire for your review, again, taking some of the
4 issues the attorney will visit with you about. They may
5 want you to explain further some of your answers.

6 This is as informal a process as we can
7 make it. Sometimes people come in a little intimidated.
8 You are the focus of attention versus hiding amongst the 600
9 or 700 people we had downstairs. The best thing about this
10 is there are no wrong answers.

11 PROSPECTIVE JUROR: Okay, yes.

12 THE COURT: Just honest answers. The
13 only question I have for you before we begin is will you be
14 able to serve this Court for a period of two weeks beginning
15 on November 10th?

16 PROSPECTIVE JUROR: I can, yes.

17 THE COURT: Thank you, sir. Mr. Wirskye?
18 Mr. Shook?

19 MR. SHOOK: I'd like to begin, Judge.

20 SCOTT MATTINELY,
21 having been duly sworn, was examined and testified as
22 follows:

23 DIRECT EXAMINATION

24 BY TOBY SHOOK:

25 Q. Mr. Mattinely, my name is Toby Shook. I'm

1 going to be asking questions on behalf of the State this
2 morning. And as the Judge said, there aren't any right or
3 wrong answers. I'm just going to go over some of the things
4 in your questionnaire and then talk to you generally about
5 capital murder and the law that applies. I see from your
6 questionnaire that you work as electrical engineer for --
7 and my copy is not as clear. Is it --

8 A. Osteo-Med Corporation.

9 Q. Okay. What do y'all do out there?

10 A. We're a manufacturer for surgical drill
11 implements and surgical fixation devices.

12 Q. Okay. And what would you do there on a
13 day-to-day basis?

14 A. I manage the assembly area where we construct
15 the surgical drills and also do some project level
16 engineering for some of those devices.

17 Q. Okay. And you -- your father, I believe, was
18 a police officer; is that right?

19 A. Correct.

20 Q. Where was he a police officer?

21 A. City of Dallas.

22 Q. How long was he?

23 A. He retired just a few years ago, but he
24 started in 1977, I believe.

25 Q. Okay. What division was he in?

1 A. Southwest.

2 Q. All right. Just a patrol officer?

3 A. Yes.

4 Q. Okay. I'm sure you grew up, then, hearing
5 stories about the job he did and that sort of thing, cases
6 he had. We have a lot of people that come down that are
7 either related directly to police officers or know them, but
8 that doesn't necessarily make you disqualified as a juror,
9 either. In fact, sometimes it makes you more qualified in
10 certain ways. Nothing about that, though, would
11 automatically bias you, do you think? You could still view
12 any case you hear as a juror objectively and just listen to
13 the facts?

14 A. I believe so.

15 Q. Okay. That's kind of what we're coming from
16 and your background as an engineer kind of illustrates the
17 point. A juror in any case, but especially a capital murder
18 case, has to be able to assure the Court that they will
19 wait, listen, and weigh all the evidence before they make a
20 decision in the guilt/innocence stage, and then listen to
21 the additional evidence that's produced in the punishment
22 stage.

23 And then prior to answering these Special
24 Issues, weigh all that new additional evidence and then look
25 at each issue separately from a different angle, which is

1 probably what you do every day in your line of work as far
2 as your projects or managing the company there. You get all
3 the information possible, then make your decisions.

4 Same thing on a jury of this nature. Do
5 you feel you are the type of person that could do that and
6 follow those types of rules?

7 A. I believe so.

8 Q. Okay. Also, this case got a lot of publicity.
9 I think every juror heard something about it on TV or saw it
10 in the newspaper. Again, that doesn't make you ineligible
11 to be a juror in this type of case. If that were true, we
12 could never seat a jury in a high publicity case.

13 The bottom line is this. Again, you have
14 to assure the Court that you could be the type of person who
15 would just listen to the facts from the witnesses on the
16 witness stand and not make your decision based on what you
17 have seen on TV or the newspapers. Common sense deal, as
18 you probably know from reading newspaper reports, that sort
19 of thing, is that they can often be highly inaccurate. The
20 better evidence is going to come from the actual witnesses
21 who were there, who will testify in front of the jury.

22 And that's what the jurors have to do.
23 We can't ask you to forget what you've seen. We can only
24 ask you to make your decisions from what you hear and see
25 here in the actual courtroom. Do you feel you could do

1 that?

2 A. I believe so.

3 Q. Okay. Now, Mr. Mattinely, you said that you
4 favor the death penalty as a law. Have you always felt that
5 way?

6 A. I don't recall ever feeling different about
7 it.

8 Q. Okay. What types of crimes do you feel could
9 be appropriate for the death penalty?

10 A. You know, if it's a life that's taken.

11 Q. Okay. Would it all depend on the brutality of
12 the crime, the facts of the crime, and the intentions in the
13 crime?

14 A. Certainly.

15 Q. Okay. On the questionnaire itself, we -- on
16 the first page, we list certain statements how people might
17 feel about the death penalty and you put No. 2, which, I
18 know you wouldn't know this, but that's our most popular
19 answer for people that believe in the death penalty. You
20 put you believe in the death penalty as appropriate in some
21 murder cases and you could return a verdict in the proper
22 case, which is to access the death penalty.

23 That answer calls for the kind of the
24 common sense approach that it would depend on the case.
25 Some murder cases may call for it and others may not. You

1 are just going to have to hear the facts. Is that how you
2 feel?

3 A. Yes.

4 Q. Okay. We also under the law have the law of
5 parties or accomplices. You have a triggerman, oftentimes,
6 in a capital murder that commits the murder, but you also
7 have accomplices that might assist him in that, but they
8 didn't actually cause the death. But under the law they can
9 be convicted. They can even receive the death penalty. It
10 all depends on how actively they're participating in that
11 crime.

12 If they are actively involved,
13 participating in the crime, then the law says they can be
14 convicted and ultimately even receive the death penalty
15 under certain circumstances. How do you feel about that
16 law? Do you think it's fair to prosecute accomplices in
17 capital murder situations?

18 A. I think it's appropriate.

19 Q. Okay. And even appropriate for a death
20 sentence to occur with an accomplice, depending on the facts
21 and their involvement in the crime?

22 A. Depending on the facts, yes.

23 Q. Okay. Let me talk to you a little bit about
24 these Special Issues and they're over here on this board.
25 You don't get to those, unless you found someone guilty, but

1 that doesn't mean the trial is over. People that are found
2 guilty of capital murder either receive a life sentence or a
3 death sentence depending on how you answer these questions.

4 Special Issue No. 1 asks the jurors
5 whether there is a probability that the defendant would
6 commit criminal acts of violence that constitute a
7 continuing threat to society. Now, that question asks
8 jurors to make a prediction. Do you feel confident that you
9 can make that prediction, if you're given enough
10 information, enough facts?

11 A. Well, given enough information, I believe so.

12 Q. Okay. In this part of the trial you may hear
13 about a person's background, if they've been convicted of a
14 crime, that sort of thing. You can get that information
15 from the actual witnesses. You may can hear good things,
16 you can hear bad things, good character evidence, bad
17 character evidence. It's just kind of a catchall where you
18 get to hear all their background and then you get to
19 reconsider what you heard in the guilt/innocence stage when
20 you look at this question and answer the question.

21 The question starts out with a no answer.
22 And you as a juror are required to require the State to
23 prove to you beyond a reasonable doubt that it should be
24 answered yes. You do that by using the evidence you have
25 already heard in the guilt/innocence stage and then this new

1 information you may hear in the punishment stage, and then
2 you answer the question yes or no, depending on the
3 evidence.

4 But it's our burden of proof to prove to
5 you that it should be answered yes. Do you feel you could
6 do that?

7 A. Yes.

8 Q. Do you feel that you could require the State
9 to prove to you beyond a reasonable doubt it should be
10 answered yes?

11 A. Yes.

12 Q. Okay. And you could answer it yes or no, it's
13 just going to depend on the facts of the case?

14 A. Right.

15 Q. Okay. This second Special Issue question has
16 to do with that area of law about the accomplices, someone,
17 the nontriggerman it asks whether the defendant actually
18 caused the death of the deceased or did not actually cause
19 the death of the deceased, but intended to kill the deceased
20 or another or anticipated that a human life would be taken.

21 The second part of the question has to do
22 with that accomplice. If they didn't actually cause the
23 death, they can still -- you can still answer this question
24 yes, if they intended a person to die or, from all the facts
25 and circumstances, they anticipated that a life would be

1 taken.

2 And that's just going to depend on the
3 facts and the person's intent and using your common sense,
4 drawing on what their intent is. Do you feel you could
5 answer that question if you're given enough information?

6 A. Yes.

7 Q. Okay. Now, the rules apply that this starts
8 out with a no answer and, again, we have to prove to you
9 beyond a reasonable doubt it should be answered yes. You
10 have to look at this question separately from the others,
11 analyze it, and then answer the question. Do you feel you
12 could do that?

13 A. Yes, I can answer that.

14 Q. Okay. And then the last question is the
15 mitigation question. It's kind of a catchall question. It
16 allows jurors to review everything they know about the
17 defendant from his background, the way he was raised,
18 growing up, his role in the crime, what actually happened,
19 his past history, that sort of thing, and determine if you
20 think there's sufficient mitigating evidence to impose a
21 life sentence, rather than a death sentence.

22 I can't tell you what mitigating evidence
23 is. It's going to be up to you and the other jurors. You
24 are not required by law to sit here today and tell us this
25 is what mitigating evidence is to me. You just have to keep

1 your mind open to it and if it exists, you can answer the
2 question yes. If you don't believe it exists or not
3 sufficiently that a life sentence should be imposed, you'd
4 answer it no.

5 But you just have to wait until all the
6 evidence is in and then look at the question fairly and
7 answer it the way you think it should be answered, according
8 to the facts of the case. Do you feel you could do that?

9 A. Yes.

10 Q. Okay. A couple of rules of law that apply in
11 each case, and I'm sure you'll be familiar with these,
12 growing up here in the United States, is the presumption of
13 innocence. Anyone charged with a crime starts out with that
14 presumption of innocence.

15 Just because he's been arrested, charged,
16 indicted, is no evidence of his guilt. The State must prove
17 to you with witnesses here in the courtroom that he's guilty
18 from the evidence. And jurors must start out with that
19 presumption and require us to prove this case beyond a
20 reasonable doubt.

21 Could you follow that rule of law and
22 require us to prove this to you beyond a reasonable doubt?

23 A. Yes, I can certainly follow that.

24 Q. Okay. The Fifth Amendment comes into play
25 many times. If someone is charged with a crime and wants to

1 testify, they can. No one can stop them. But if they
2 choose not to, the Judge will instruct you that we have a
3 Fifth Amendment that you can't hold that against a citizen.
4 You can't use it as evidence against him in a trial.

5 Now, most jurors would want someone to
6 testify that's on trial. You want to hear all the evidence.
7 But there could be many reasons why a person chooses not to
8 testify. He could be real guilty and we could make him look
9 guilty. He may be following his lawyer's advise who tells
10 him I don't think you should testify and he does what his
11 lawyer tells him. He may be poorly educated. He may have a
12 speech impediment. He may not perform well in front of
13 people and may be innocent, but look guilty. He may not be
14 able to hold up his own against a trained prosecutor.

15 There could be several reasons. So the
16 Court takes care of that by telling the jurors, if a person
17 doesn't testify, you can't hold it against him. You can
18 make your decision simply on what you hear in the courtroom
19 from those witnesses. Could you follow that rule of law?

20 A. Yes.

21 Q. Okay. And finally, as far as police officers
22 go, no doubt you've known a lot of police officers and you
23 were raised by a police officer. A lot of people respect
24 the job they do, but you can't start them out ahead of other
25 witnesses. You have to wait until they testify and then

1 judge their credibility, recognizing that there's good
2 police officers, there's some bad police officers, and you
3 just have to wait until they testify and then you judge
4 their credibility, like you would any other witness. Do you
5 feel you could do that?

6 A. Yes.

7 Q. Okay. Bottom line, again, Mr. Mattinely, is
8 you have to be able to keep your mind open to everything and
9 then make your decisions. We can't preview the facts of
10 this case. We can only ask you to keep your mind open to
11 it, follow these rules, and then make your decisions based
12 on the facts of the case. Do you feel you could do that?

13 A. Yes.

14 Q. Okay. We know it's an inconvenience,
15 obviously, to be away from your work. That's true with
16 every juror. But if you were called to testify, you could
17 serve the two weeks. --

18 THE COURT: Testify?

19 Q. (By Mr. Shook) I mean, to sit as a juror, you
20 could serve and then make your decisions. Is that true?

21 A. Yeah. I don't think it will be too big a
22 problem.

23 Q. Okay. Well, we appreciate your patience.

24 MR. SHOOK: And that's all the questions
25 I have at this time, Judge.

1 THE COURT: Ms. Busbee?

2 CROSS-EXAMINATION

3 BY MS. BUSBEE:

4 Q. Good morning, Mr. Mattinely. What did you
5 think when you were asked to come down here? Were you --
6 were you surprised?

7 A. I was surprised. I really expected that I was
8 going to be excluded, based on my father's police career.

9 Q. Well, not necessarily, although, of course,
10 that gives us concern because, as you know, it's one of the
11 allegations in the indictment. I notice you said your
12 father had inspired you to become an engineer. How did he
13 inspire you to take a different career path from what he had
14 taken?

15 A. Well, he was actually, prior to the Dallas
16 police officer, he was a Navy pilot. And I was always
17 intrigued by the planes that he flew.

18 Q. So he, obviously -- he has an engineering
19 talent as well?

20 A. Yeah, he has an engineering degree as well.

21 Q. I know that Mr. Shook touched upon this and
22 obviously you admire police officers. Do you think that
23 you, I mean, just in your heart of hearts, could be
24 completely unbiased and unaffected by the facts as they have
25 been explained to you in this case? We can't go into the

1 facts, but we do know that a police officer was killed.

2 A. Honestly, I can't say that I could not be
3 completely unbiased. I just can't say for sure that I would
4 not be completely unbiased.

5 Q. Okay. See, the problem is we just -- we have
6 to pin people down. Do you think you might be able to set
7 it aside? We recognize people have biases. We couldn't
8 find people who didn't have biases necessarily. But if you
9 could, the question would be if you could set, recognize
10 that you may have one and set it aside and be completely
11 fair to the defendant in this case?

12 A. I believe I can.

13 Q. Okay. What, are there anything, concerns that
14 you have? You know, this questionnaire asks a lot of
15 questions, but sometimes you just don't get a feel for a
16 person from a questionnaire. Is there anything that you
17 want to share with us or your feelings about the death
18 penalty or serving on this jury?

19 A. For me, I just look at it as a matter of
20 justice, a matter of law. It's just a necessary part of our
21 justice system, I suppose.

22 Q. Right. And would you feel as comfortable
23 finding the defendant not guilty, if the State failed to
24 prove their case as you would finding him guilty, if they
25 did?

1 A. Certainly.

2 Q. And it would be the same question for the
3 second portion of the trial. If you had found the defendant
4 guilty of the offense of capital murder, would you feel as
5 comfortable answering questions that would give a life
6 sentence, if the State failed to prove their case or if you
7 felt Special Issue No. 3 called for a life sentence, as you
8 would giving a death sentence, if you felt that they proved
9 their case and didn't?

10 A. Yes.

11 Q. All right. Fair enough.

12 MS. BUSBEE: I have no more questions of
13 this juror, Your Honor.

14 THE COURT: Thank you, Mr. Mattinely. If
15 you would, wait for us outside and we'll have you back in
16 just a minute.

17 [Prospective juror out]

18 THE COURT: What says the State on juror
19 No. 2197, Scott Mattinely?

20 MR. SHOOK: State has no challenges for
21 cause.

22 MS. BUSBEE: Defense has no challenges
23 for cause.

24 MR. SHOOK: State would accept the juror,
25 Your Honor.

1 MS. BUSBEE: We will exercise a
2 preemptory challenge against juror No. 2197.

3 THE COURT: Ask Mr. Mattinely to come
4 back in, please.

5 [Prospective juror in]

6 THE COURT: Mr. Mattinely, thank you so
7 much for coming in today. You are not going to be seated on
8 this jury.

9 PROSPECTIVE JUROR: Okay.

10 THE COURT: So, that's all I can tell
11 you. Thank you very much.

12 [Prospective juror out]

13 (Recess)

14 THE COURT: Mr. Chance.

15 [Prospective juror in]

16 THE COURT: Good morning.

17 PROSPECTIVE JUROR: Good morning, Your
18 Honor.

19 THE COURT: We have juror No. 672,
20 Mr. Kenneth Lewis Chance. Mr. Chance was rescheduled from
21 his initial appearance today due to the fact that he was out
22 of the country. Let the record reflect that when -- the
23 letter was received, but no one had called back, the Court
24 made contact via a female with an associate of Mr. Chance's.
25 Copies to counsel in this matter.

1 Everything on e-mail was copied to the
2 lawyers, so they understand there was no ex parte
3 communication with anybody in this matter, other than to
4 secure the appearance of Mr. Chance here today for voir
5 dire. I scheduled him in today to replace juror No. 2231,
6 the lady who had moved to Missouri and was no longer a
7 resident of Dallas County.

8 Having said that for the record,
9 Mr. Chance, have you had an opportunity this morning to
10 review the guide I provided you with?

11 PROSPECTIVE JUROR: Yes, Your Honor.

12 THE COURT: I also gave you a copy of
13 your questionnaire that you filled out for us in May.
14 That's to help you refresh your memory on some of the
15 answers that you have given. Maybe the lawyers want to have
16 you further expound upon what you were thinking at the time
17 you made those answers.

18 The bottom line here today is you've got
19 a lot of law in front of you. The lawyers are going to try
20 to explain it to you and help you understand how it relates.
21 At the end of the process I have two questions to ask.
22 Number one, do you understand the law? Number two, can you
23 follow the law?

24 PROSPECTIVE JUROR: All right, sir.

25 THE COURT: At this point, I've read your

1 questionnaire. We all understand where you're employed.
2 I'm quite sure they're going to ask you some more questions
3 about that. But what is your availability to attend this
4 trial for two weeks beginning on November 10th?

5 PROSPECTIVE JUROR: Your Honor, I'm
6 working back with Dynacorp, recruiting. In May we had been
7 delayed a little bit by the violence overseas in Iraq, sir.
8 Honestly, we just got word Friday to start preparing. I got
9 my first group going to get e-mailed Saturday and I'm going
10 to be second. I was second Kosovo, second Bosnia, I'm going
11 to be second Iraq, but I'm going to be the second group
12 probably leaving two weeks after this next group goes next
13 week, Your Honor.

14 THE COURT: Are you going to be deployed
15 in October?

16 PROSPECTIVE JUROR: Yes, sir.

17 THE COURT: How long is your deployment?

18 PROSPECTIVE JUROR: One year, Your Honor.

19 THE COURT: You'll be gone for a year?

20 PROSPECTIVE JUROR: At least.

21 THE COURT: And what will you be doing
22 for the United Nations?

23 PROSPECTIVE JUROR: United Nations? No.

24 THE COURT: Dynacorp?

25 PROSPECTIVE JUROR: We used to be police

1 missions. The first three were. I was once in Bosnia,
2 twice in Kosovo, with the United Police. This is going to
3 be American right now. There's a lot of haggling over who's
4 going to run it. The U.N. is trying to get their nose in
5 it, but we're going to send over a thousand American police
6 officers, corrections, a few defense attorneys, prosecutors,
7 judges, to go over there and hopefully, hopefully, help them
8 rebuild their judicial law enforcement system.

9 THE COURT: So the bottom line is you are
10 preparing and you fully expect that you will be deployed,
11 beginning in October 2003?

12 PROSPECTIVE JUROR: I honestly do, Your
13 Honor.

14 THE COURT: You seem to be real upset
15 about this.

16 PROSPECTIVE JUROR: Well, it's my duty to
17 come here and I hate saying I don't know because, you know,
18 I'm honest. In May I was supposed to leave the first group
19 May 6, and that was delayed. I came here in May and I said
20 I'm available because I knew it was going to be delayed, but
21 it's my duty to come here as an American citizen and I just
22 got word Friday we're starting to ready to bail out.

23 THE COURT: All right. Mr. Shook?

24 MR. SHOOK: I think we can come to an
25 agreement, then, sir.

1 MS. BUSBEE: Yeah, we obviously don't
2 want to mess up your service, sir.

3 THE COURT: We have to go through this
4 process when the lawyers question individuals. I will track
5 them down all over the world to get them here, so we can put
6 it on the record. We appreciate your time and service to
7 this Court and especially this country. We wish you well
8 and a safe return.

9 PROSPECTIVE JUROR: Thank you. What I'm
10 going to try and do over there is help them get what we've
11 got here. Thank you all very much.

12 [Prospective juror out]

13 THE COURT: Ms. Liston.

14 [Prospective juror in]

15 THE COURT: Good afternoon.

16 PROSPECTIVE JUROR: Hi.

17 THE COURT: How are you?

18 PROSPECTIVE JUROR: I'm fine.

19 THE COURT: We've got juror No. 2376, Ms.
20 Judy K. Liston, is that pronounced correctly?

21 PROSPECTIVE JUROR: Yes.

22 THE COURT: Ms. Liston, welcome to the
23 283rd. Thank you for being here early. You were actually
24 scheduled to be the third one this afternoon.. But I like
25 for people to be on time and be early, so you will be out of

1 here several hours earlier than you should have been.

2 PROSPECTIVE JUROR: Thank you.

3 THE COURT: So, I just tell people the
4 way we work. First one here gets to go first. Did you have
5 enough time to review the guide that I provided for you?

6 PROSPECTIVE JUROR: Yes.

7 THE COURT: I also provided a copy of the
8 questionnaire that you filled out for us in May. The
9 attorneys may want to further explore some of your answers,
10 and hopefully you looked at it and can, once again, think of
11 the issues on trial here. No, there's no way you can
12 understand all the law I've given you so far. That's why
13 the lawyers will visit with you about the law and help you
14 understand how it all relates.

15 At the end of this process there are two
16 questions that I must ask you. Number one, do you
17 understand the law? And, number two, can you follow the
18 law? That's the big picture that I have to answer, okay?
19 Only question that I have for you at this time is will you
20 be able to serve this Court beginning on November 10th for a
21 period of two weeks?

22 PROSPECTIVE JUROR: The only issue I have
23 is I have a flight coming in November 10th at 5:30 in the
24 morning. And I did put on there that I would be out of town
25 the 5th through the 10th.

1 THE COURT: What is the nature of your
2 trip?

3 PROSPECTIVE JUROR: We go to Las Vegas
4 every year to the PBR finals, and I've had tickets since
5 last October for those. And I did bring a copy of my
6 itinerary, if you wanted to see it.

7 THE COURT: No, I want to go to the
8 rodeo, too, no question about it. Is there any way that --
9 I mean, I know finals are Sunday night.

10 PROSPECTIVE JUROR: They're Sunday noon.
11 They will be Sunday at 12:00. And our flight is due to
12 leave out of Las Vegas at, I believe, 12:30 in the morning.
13 And I'm supposed to be in Dallas by 5:00, which would allow
14 me time to get here.

15 THE COURT: Is there any way you can move
16 that flight up a little bit?

17 PROSPECTIVE JUROR: I don't know. I
18 could check and see.

19 THE COURT: I mean, you're -- obviously,
20 you'll have a great time in Vegas, but coming in that Monday
21 morning, you'll be dragging pretty good.

22 PROSPECTIVE JUROR: Yes, sir.

23 THE COURT: If you get put on this jury,
24 it would behoove you to move that flight forward as best you
25 could. You might miss a half a day of whatever you might be

1 doing there in Vegas, but --

2 PROSPECTIVE JUROR: I don't do much
3 gambling.

4 THE COURT: But the bottom line is you
5 could make yourself available for this trial?

6 PROSPECTIVE JUROR: Yes, I can call and
7 see if I could make the changes.

8 THE COURT: With that, I will turn it
9 over to Mr. Wirskye. He has some questions for you.

10 MR. WIRSKYE: May it please the Court?

11 JUDY LISTON,
12 having been duly sworn, was examined and testified as
13 follows:

14 DIRECT EXAMINATION

15 BY MR. WIRSKYE:

16 Q. Ms. Liston, how are you this afternoon?

17 A. Fine.

18 Q. My name is Bill Wirskye and I'll be the
19 Assistant DA that will be visiting with you for the next few
20 minutes. What I would like to do, maybe, is follow up on
21 some of the information that you were kind enough to give us
22 in that long questionnaire, talk to you a little bit about
23 your thoughts and feelings about the death penalty, then
24 maybe talk about some of the death penalty type laws that
25 apply, and some of the rules that apply in any criminal

1 case.

2 I know it's a little unnatural, we've got
3 you up on the witness stand. You may feel like you are on
4 trial, but it's just kind of the best way that we had to do
5 it. Because it's a death penalty case, the law says that we
6 talk to everybody individually, and this is kind of, like I
7 said, the best way we've found to do it. It sounds like
8 you're a rodeo fan?

9 A. Yes, sir.

10 Q. Okay. Or at least PBR, right?

11 A. Yes, sir.

12 Q. I've been trying to go for the last three
13 years, but I've never made it, so. Y'all spend the whole
14 week down there, or --

15 A. We leave usually the day before or the day of
16 the starting of them. We've gone every year since 1996.

17 Q. Oh, okay. Was that the first year they had
18 it?

19 A. That was the second year.

20 Q. You have a favorite rider?

21 A. Um, Adriano Morias.

22 Q. Okay. My wife lets me get about as far as
23 Mesquite, so that's about the only rodeo I get to take in.
24 But, tell us what you do for a living. It looks like you're
25 in the semiconductor field?

1 A. Yes, sir.

2 Q. Okay. You used to be TI and I guess TI --

3 A. Got sold to Raytheon and then Raytheon had to
4 sell off our particular group to Triplant, but I've
5 basically been in the same location now for 30 years.

6 Q. Okay. What do you do, like, what's a normal
7 day like for you?

8 A. I'm a shipping manager. I'm responsible for
9 doing all the shipping that goes out of our company daily.

10 Q. Okay. Let's see, you also said, another one
11 of my hobbies, you like to fish?

12 A. Yes.

13 Q. What kind of fishing do you do?

14 A. Anything I can catch.

15 Q. Okay. Any particular lake y'all frequent, or

16 --

17 A. Um, Tawakoni.

18 Q. Okay. Now, you told us generally you are in
19 favor of the death penalty; is that right?

20 A. Yes, sir.

21 Q. Okay. Why do you think we ought to have the
22 death penalty available for at least some murder cases?

23 A. Depending on the circumstances and if it's
24 premeditated, if the person is aware, has all of his senses
25 about him, and he still chooses to take someone's life.

1 Q. Okay. We talk to a lot of people and they
2 always mention premeditation as, I guess, being a factor or
3 circumstance that would be important to them. In Texas we
4 don't really require premeditation. We just require that
5 intent. You know, intent can be formed in an instant, a
6 split second. I think, you know, when most people think of
7 premeditation, they think of planning or something that is
8 thought out. Is that kind of where you are?

9 A. Yes, sir.

10 Q. Okay. Would you limit the death penalty only
11 to those cases that were premeditated, where somebody
12 planned it out or thought about it, that type thing?

13 A. No.

14 Q. Okay. Are there any other factors that you
15 think would be important when you look at a murder case in
16 deciding whether it was a case that may call for the death
17 penalty?

18 A. Well, I would believe the law. If the law
19 states that that is something that requires the death
20 penalty.

21 Q. Okay. What we have in Texas, and you may have
22 had a chance to look through that kind of packet of law that
23 we gave you, I know it's sometimes not the easiest thing to
24 read through, the way it's structured. But in Texas we just
25 have the death penalty for murder cases and then only

1 certain types of murders. If you kill a certain person,
2 like a child under six, a police officer or fireman on duty,
3 a prison guard, that type of thing.

4 Or if you commit a murder, an intentional
5 murder, in the course of another crime, maybe robbing
6 somebody, or breaking into their home, committing burglary,
7 or murder during a rape, that type of thing, mass murders or
8 people that are serial murders, that commit quite a few
9 murders. That's kind of what we limit the death penalty for
10 in Texas, consideration in those types of crimes.

11 Does that kind of agree with you or if
12 you were Governor for a day is that kind of, would you
13 expand the group or shrink it, or what do you think?

14 A. I think that's, pretty well would cover what I
15 would agree with.

16 Q. Okay. Is there a particular type of case that
17 comes to mind? I know you mentioned the Darlie Routier
18 case.

19 A. Yeah.

20 Q. Any other case that you can think about that
21 comes to mind when you think about a death penalty case?

22 A. Not really.

23 Q. Okay.

24 A. That one came to mind because it was so close
25 to where I live.

1 Q. And it sounds like you came to the opinion
2 that she did actually do it; is that right?

3 A. Yes.

4 Q. Okay. Did you have, obviously, she got the
5 death penalty for it. Did you think that was an appropriate
6 punishment?

7 A. Yes, since she was found guilty.

8 Q. Okay. Let me ask you another question on your
9 questionnaire here. Let's see. I'm looking at page 5. I
10 think you have it in front of you. We kind of ask people,
11 we give them all these statements and ask them kind of what
12 they think about these statements, whether they agree,
13 disagree, or uncertain about it. And that very first
14 statement there about halfway down on page 5, says most
15 criminals are actually victims of society's problems. And
16 you marked that you were uncertain about that. I'm just
17 curious what you were thinking when you marked that.

18 A. I was thinking more about the crimes they
19 commit. I think that there is circumstances in people's
20 lives that can make them make poor decisions, bad decisions,
21 quick decisions, and that was the reason, depending on the
22 case or the crime.

23 Q. Okay. When you said there are circumstances
24 in their life that may make them or lead to them doing that,
25 what did you have in mind? What type of circumstances?

1 A. The type of way they were raised, environments
2 in which they were raised.

3 Q. Okay.

4 A. I think environment has a lot to do with the
5 way people live their lives and it influences. They have
6 poor self-esteem, and it definitely influences a person's
7 decision and the way they live their lives.

8 Q. Okay. I think we asked you a question about
9 that.

10 A. Similar to that.

11 Q. In the questionnaire on page 9, almost halfway
12 down that page. I guess it's kind of what you told us, life
13 affects decisions we make. But looking at that question, is
14 that something that you feel you would look at in a death
15 penalty case in deciding whether a person deserved the death
16 penalty, the genetics, the circumstances of birth, and
17 upbringing, and things like that?

18 A. I think it would just have to be what I was
19 looking at. You know, I would have to know specifics. Not
20 everything in your life would make you take someone else's
21 life, and I would just have to look at each scenario.

22 Q. Okay. That's pretty much what the law is and
23 we'll probably visit about that more in just a second. And
24 we always ask everybody that comes down here if they have
25 had any experience with the system or known anybody that's

1 gone through it, and I think you mentioned that your
2 ex-son-in-law had a DWI a few years ago?

3 A. And he's still serving in and out for, I think
4 probation violations. I don't have anything to do with him,
5 though.

6 Q. Okay. Has he been to prison for that charge?

7 A. Yes.

8 Q. Okay. Based on what you know, do you think he
9 was treated fairly?

10 A. Yes, I think more than fairly.

11 Q. Okay. Also, finally, I think on page 4 I had
12 a question. Halfway down we asked you this question, do you
13 think spending a lifetime in prison is equivalent to the
14 death penalty? And you marked yes, and then said, in some
15 cases. I was just curious what your thought was on that
16 question, if you remember. I know it's been a while since
17 you filled this out.

18 A. Let's see. That was on page 4 or page 5?

19 Q. Page 4 about halfway in the middle of that
20 page.

21 A. Oh, okay, I see it. I think what I was
22 thinking about was the type of case and what was the crime
23 itself.

24 Q. Okay. Just kind of, again, depending on the
25 facts of each case?

1 A. Yes.

2 Q. Okay. You told us, I guess, generally or
3 philosophically you are in favor of the death penalty --

4 A. Yes, sir.

5 Q. -- in the appropriate type case. And we talk
6 to a lot of people, a lot of people who are very strongly in
7 favor of the death penalty, as you may be, in an appropriate
8 case.

9 But some people under certain
10 circumstances make distinctions about people. And what I
11 mean by that is this. You know, oftentimes crimes are
12 committed by more than one person. You may have a group or
13 a gang of people that commit a crime. What the law says is
14 that we can prosecute everybody that was actively involved
15 in the crime, you know, whether it's shoplifting or all the
16 way up to capital murder.

17 And when you get up to capital murder,
18 you may have a situation where only one of that group of
19 people who was involved in the crime actually pulled the
20 trigger and actually took the life, okay? You may have the
21 other people that were involved as accomplices is a word we
22 often hear, that were involved but didn't actually pull the
23 trigger and take the life. Does that make sense to you?

24 A. Yes, sir.

25 Q. Between kind of the triggerman and the

1 nontriggerman?

2 A. Yes, sir.

3 Q. And a lot of people tell us, you know, I'm
4 strongly in favor of the death penalty for the triggerman.
5 I could see that and I understand it. But if it was up to
6 me, when it comes to those accomplices who didn't actually
7 cause the death, I would just kind of take the death penalty
8 off the table. You know, I may want to lock them up for
9 life, but I take that death penalty off the table.

10 They sometimes think it's not deserved,
11 maybe the religious, moral, or ethical reasons, something
12 like that, since the accomplices didn't actually take the
13 life. Some people say, hey, it just kind of depends on the
14 facts and circumstances. I'm wondering what you think about
15 that scenario, the death penalty for accomplices?

16 A. Well, that's a hard question to answer.

17 Q. I know it's not something people think about
18 normally.

19 A. No. I think sometimes people can be at the
20 wrong place at the wrong time, and I also feel that you
21 can't always control everyone that's there. If there's a
22 group and it's a stronger person, a more domineering person,
23 another person, an accomplice or a person with them could
24 not stop what happened.

25 Q. Okay.

1 A. And I guess that would depend on the
2 circumstances that whether or not, you know, what happened
3 at the time.

4 Q. Okay. Let me give you kind of a hypothetical
5 or a made-up set of facts to explain how the law works, the
6 law of accomplices, and get your thoughts on that.

7 A. Okay.

8 Q. Let's say Mr. Shook and I, the other
9 prosecutor, decide we're going to rob a bank and we get
10 together and agree that the plan is that he's going to take
11 a pistol in and hold up the tellers and hold them off while
12 I come in with the bag. I'm not going to have a gun. And
13 I'm kind of going to empty out all the cash drawers as he's
14 got everybody held up.

15 And let's say we go to do that bank
16 robbery and during the bank robbery, for whatever reason,
17 maybe one of them looks at Mr. Shook funny or I see one of
18 them going for a silent alarm and I tell him that, he shoots
19 and kills that teller, okay? He's committed an intentional
20 murder during the course of a robbery. He could be found
21 guilty of capital murder and ultimately face the death
22 penalty.

23 The law also says under, depending on the
24 facts and circumstances, I could also be found guilty of
25 capital murder and may potentially face the death penalty as

1 well. What do you think about the law in that type of
2 scenario?

3 A. If that's the law, then we have to go along
4 with the law. My personal opinion on that was you have no
5 control over what he did.

6 Q. Okay.

7 A. Now, if you were aware that he had the gun and
8 was going in and would use it and you've known that he has
9 used it in the past, maybe the circumstances would be
10 different.

11 Q. Okay.

12 A. But I don't think you would have had control
13 over it.

14 Q. Okay. So under the set of facts I gave, you
15 don't see giving the death penalty to the accomplice?

16 A. To you, no.

17 Q. Okay. Let me kind of look at it one more
18 level down in analysis. The law actually says there's two
19 different ways for us to convict an accomplice, okay? The
20 first way is if the accomplice, me in the example, actively
21 encourages, directs, or solicits him to commit a capital
22 murder. And that would maybe be a situation like I see
23 somebody going for that silent alarm and I turn to him and
24 say, Toby, quick, shoot her before she can get that alarm.

25 You know, at that point I directed him to

1 commit a capital murder. Even though I didn't pull the
2 trigger, I could be found guilty as an accomplice, what we
3 call a party to an offense in Texas, and maybe receive the
4 death penalty. That sounds like something you agree with;
5 is that right?

6 A. Yes.

7 Q. The other way to convict an accomplice is kind
8 of what we call under the law of conspiracies. And this is
9 where some people, you know, personally kind of differ with
10 the law. And I want to run it past you and see what you
11 think.

12 You know, let's go back to that example
13 and say just maybe one of them looked at Mr. Shook funny,
14 and for whatever reason he decided to shoot and kill them.
15 I didn't say anything, I didn't encourage him or direct him
16 to do anything. The law says that if I should have
17 anticipated, okay, by going in and doing that bank robbery,
18 that a death could occur, whether I intended it or not, I
19 could have no intent that anybody get killed. But the law
20 says if I should have anticipated it, then I could be found
21 guilty of capital murder and ultimately face the death
22 penalty.

23 And a lot of people we talk to kind of
24 draw a distinction between that first situation where I'm
25 kind of directing him and obviously I had the intent. And

1 the second situation, law of conspiracy, where me as the
2 accomplice, I didn't have any intent. And a lot of people,
3 that's kind of where they differ with the law. What do you
4 think about that second way, that conspiracy where the
5 accomplice didn't have any intent?

6 A. You were aware of his past and that he had
7 committed this type before?

8 Q. Well, I mean, that was the plan we did was to
9 take a loaded gun in to do a bank robbery.

10 A. If that was the law, then I would have to find
11 you guilty.

12 Q. Okay. Even though I didn't intend for anybody
13 to get hurt?

14 A. Yes.

15 Q. What about the death penalty under that
16 circumstance, under the law of conspiracy, for me?

17 A. It's a hard decision. But I guess, if we're
18 directed and found you guilty and the law says that, then
19 that would be how I would have to go with it.

20 Q. Well, the law says you can consider it. You
21 know, the law doesn't say you have to do it. That's kind of
22 why we talk to people now because we don't want to put
23 anybody over there whose personal beliefs kind of conflict
24 with the law.

25 A. Yes, sir.

1 Q. That's why we talk about it now before you get
2 over in the jury box. Because if it is a situation where
3 you don't believe in the death penalty for the accomplice
4 under conspiracy like we talked about, then, obviously, it
5 would be difficult for you or might impair you from being a
6 juror in this case if you don't really think the law is
7 right in that situation. What do you think about that?

8 A. I guess a lot of it just has to do with the
9 circumstances of the whole case and what happened at that
10 time when you're there. And I don't know that I disagree
11 with the law or I agree with it. I guess I just feel like
12 it's my responsibility to listen to all the circumstances
13 and then if I agree that the accomplice was there and was --
14 did feel like the accomplice knew that a death could occur,
15 then, yes, I'm responsible.

16 Q. Okay. So you wouldn't automatically take the
17 death penalty off the table for an accomplice?

18 A. No.

19 Q. Just because he didn't have that intent?

20 A. No.

21 Q. Okay. You would be able to look at the law
22 and see whether I should have anticipated that a death would
23 occur?

24 A. Yes.

25 Q. And depending on the facts and circumstances,

1 you could consider the death penalty for me?

2 A. Yes.

3 Q. Okay. The reason I spend so much time on it
4 is that is the theory of law that we're proceeding under in
5 this case. I can't get into the facts of this case, but we
6 are prosecuting Mr. Murphy as an accomplice and that's why
7 we spend so much time on it, because we don't want somebody
8 over there in the jury box whose personal opinion would kind
9 of interfere with their ability to follow the law. Does
10 that make sense to you?

11 A. Yes, sir.

12 Q. Okay. And you don't think your personal
13 beliefs would interfere or impair you in any way from
14 sitting in this type of case?

15 A. I don't think so. I mean, I've only been on
16 one case in my whole life and it was a sentencing that he
17 pleaded guilty, so --

18 Q. Okay. Well, let me ask you this. Almost
19 everybody we talked to has heard something about this case.

20 A. Yes.

21 Q. You know, through the media, read about it,
22 seen about it. And you indicated you had as well.

23 A. Yes.

24 Q. I'm just curious, what have you heard about
25 this case?

1 A. I saw the chase and when they were looking for
2 them. I guess just everything that was on the news that
3 came on. I don't watch the news every night. I did see
4 some of the arrest. I didn't realize the name. I didn't
5 recognize the name.

6 Q. Sure.

7 A. I recognized Aubrey Hawkins' name when I read
8 the questionnaire, but I didn't follow details.

9 Q. Okay. Have you kept up with or heard about
10 any of the subsequent court proceedings?

11 A. I've heard of some. I don't remember what all
12 they got. I know that they've had one not too long ago.

13 Q. Okay. We ask different jurors about that and
14 how that may affect them because in a case like this so many
15 people have heard so much about it. What the law kind of
16 requires is that you're able to put that out of your mind
17 and just listen to what you hear in the courtroom.

18 Some people tell us, very frankly, I've
19 heard too much about it. I can't tell you for sure. I
20 think it might affect me based on what I've heard. And if
21 that's the case, that's fine with those people. You know,
22 they just wouldn't be the right juror in this case. They
23 could get another juror summons on down the line. But some
24 people say, you know, even though I've heard about it, I can
25 kind of put it to the back of my mind and just kind of give

1 a fair trial to both sides.

2 And, you know, we have to rely on you to
3 look in your heart of hearts and tell us and just be honest
4 with us, if that's something you think you can do.

5 A. Like I said, I, you know, I didn't follow it
6 day in and day out, and I may have followed it more than I
7 realized. When I start hearing some of the testimony, it
8 may come back to me. But I'm not a person that follows
9 these kind of cases.

10 Q. Okay. You think as you sit there right now
11 that you could assure both sides and the Judge that you
12 could just base your verdict on what you hear in the
13 courtroom and even if you remember something during the
14 course of the trial, that you wouldn't let it influence your
15 verdict in any way?

16 A. I don't think it would.

17 Q. Okay. Fair enough. All trials in Texas --
18 the one you sat on was a little bit different because y'all
19 just did sentencing.

20 A. Yes, sir.

21 Q. But all criminal trials in Texas, even capital
22 murders, are in two parts. The first part would be the
23 guilt/innocence phase. I know you've gotten a chance to
24 look at our indictment in that case. And that's where the
25 jury decides whether we've proved that he's guilty. Did we

1 bring you enough proof beyond a reasonable doubt that he's
2 guilty of capital murder.

3 And if you find that he did or we did,
4 then you move into the second phase of the trial which is
5 the punishment phase. And that's where you get to hear more
6 about the background, the history, good or bad, of the
7 person that's charged and some additional-type information,
8 to help you answer these three questions that are up on the
9 wall.

10 And that's kind of how we do a death
11 penalty case. We don't ask a juror to write in, you know,
12 death sentence or life sentence. We ask a jury to answer
13 these three questions, and depending on the answers to those
14 questions, that determines the appropriate sentence in the
15 case.

16 And just very briefly, in a nutshell,
17 we'll come back to it in a second, but the first question
18 asks is he a future danger to society? If that's answered
19 yes, then you move on to that second issue, or second
20 question, which kind of deals with the situation we've
21 already talked about, the accomplices. Basically asks, you
22 know, did the person anticipate that a human life would be
23 taken?

24 And if that's answered yes, then we move
25 to Special Issue No. 3, which is what we call the mitigation

1 question. It basically asks a juror to see if there's
2 anything in his past or background or something that kind of
3 mitigates against the death penalty. Is there something
4 sufficient in what you've heard in the evidence to spare his
5 life and not give him the death penalty? And, again, if
6 that question is answered no, then the death sentence is
7 automatic. The Judge imposes it.

8 And I know it's one thing -- you've told
9 us kind of philosophically in the abstract you believe in
10 the death penalty. And some people we talk to, even though
11 they may believe in the death penalty in certain
12 circumstances, this just isn't their cup of tea.

13 What I mean by that is once they get down
14 here, they see the individual here in the court, even though
15 they may believe in the death penalty, they realize this is
16 probably just -- I'm not necessarily cut out for this. It's
17 a little too real at that point. It's no longer in the
18 abstract or philosophical, you know, because if those
19 questions are answered yes, yes, and no, the Judge sentences
20 the person to death.

21 They're taken immediately down to death
22 row where they wait. At some point in the future, I can't
23 tell you how long, but Judge Cunningham would issue a date
24 of execution. On that date the person would be moved from
25 death row to a holding cell in downtown Huntsville, the main

1 prison. That person would wait there that day, get a chance
2 to meet with friends, family, spiritual advisors, have a
3 chance for a last meal, that type thing.

4 As it got close to 6:00 in the afternoon,
5 which is the time that is mandated by law that all
6 executions take place, he'd be moved from that holding cell
7 down the hall to the execution chamber. Whether he wanted
8 to go or not he'd be taken against his will, if need be.
9 And you may have seen the execution chamber on TV, I don't
10 know. It's got that gurney with the arms and straps.

11 He'd be taken in there and strapped down
12 against his will, if need be. An IV would be started in his
13 arm. There would be witnesses there both from his side and
14 also maybe victims or friends of the victim of the crime to
15 witness the execution. The warden would give him a chance
16 to make a last statement. He may proclaim his innocence,
17 you know, up to the very end. He may beg for forgiveness,
18 you know.

19 Once he's given a few minutes to make
20 that last statement, the warden would signal to the
21 executioner. Lethal substances would be released into that
22 IV. Very shortly after that the heart would shut down, the
23 lungs would collapse, he would lose consciousness, and then
24 drop into a deep coma and ultimately die in a very short
25 time.

1 And I go through that not to be morbid
2 with you, but just kind of to let you know kind of what the
3 end result of this process may be, because there's people
4 that tell us, you know, they know those type details that I
5 just shared with you are oftentimes reported on the TV or in
6 the newspaper, that type thing. And there are people that
7 tell us, you know, I just, I don't know if I could live with
8 that. I wouldn't want that on my conscience, knowing that
9 was on down the line.

10 And we recognize that not everyone is cut
11 out for this. But we kind of leave it up to you. You know,
12 only you can answer whether you think you're the type person
13 that could take pen in hand and maybe answer those three
14 questions in such a way that it may actually result in the
15 execution of an individual, a person you've gotten a chance
16 to see in court maybe for two weeks. Do you think you're
17 the type person that could participate in that process?

18 A. I don't know. It's very difficult. I mean,
19 yes, I do believe in the death penalty and, you know, if I
20 had a choice, I'd just as soon somebody else do it.

21 Q. That's kind of the analogy that I use is these
22 guys that wash the windows downtown on those skyscrapers.
23 I'm deathly afraid of heights. I understand it
24 intellectually up here, somebody's got to do it, and I'm
25 glad somebody does. But you couldn't get me up there. I

1 just, I couldn't do it.

2 And a lot of people feel that way about
3 the death penalty. They think it's a good thing for
4 society, they think somebody should do it, they're glad
5 people can do it and serve as jurors, but they tell us it's
6 just not my cup of tea. I'm not cut out for it. It's
7 something that if you put me over there would make me so
8 uncomfortable, you know, it just may impair my ability to be
9 a fair juror to both sides. We kind of leave it up to you
10 to tell us whether you think you're that type of person.

11 A. Like I said, I've never done that, so I don't
12 know. I know that I will have to be proven within a
13 reasonable doubt that he is responsible before I could vote
14 on those questions, and I would have to know that, and I
15 would have to feel that in my heart.

16 Q. Okay.

17 A. And if I didn't, I don't believe that anyone
18 could convince me to change my mind.

19 Q. Okay.

20 A. Um --

21 Q. I'll just tell you generally, what we call the
22 burden of proof in Texas, the burden that the State has to
23 prove. It's the same in every criminal case. It's beyond a
24 reasonable doubt. Whether you are talking about the
25 shoplifter or you're talking about that capital murder. And

1 some people think that, you know, death penalty cases are a
2 little different. In fact, the Supreme Court says death
3 penalty cases are different in a sense.

4 But some people feel that, you know, it's
5 so important when you're talking about that life and death
6 decision, that they tell us, you know, the standard, the
7 burden, ought to be a little higher on the State in a death
8 penalty case. You just have to prove it to me beyond any
9 doubt, reasonable or otherwise. And, again, it's fine. We
10 understand that people feel that way. But what do you think
11 about that?

12 A. I wouldn't, I couldn't have a doubt. I would
13 have to feel like, I just couldn't take somebody's life,
14 otherwise. If it wasn't proven to me that he was guilty, he
15 did go into that place, or come out or wherever, and he did
16 that with the intent and knew that that was going to happen,
17 that a life was going to be taken, I would have to, it would
18 have to be proven to me.

19 Q. What I hear you saying is -- I don't want to
20 put words in your mouth, is you just couldn't have any kind
21 of doubt in order to actually participate in this type of
22 process or find somebody guilty and sentence them to death?

23 A. I don't know. I just don't know. I can't, I
24 can't really say either way, depending on the circumstances
25 and the testimonies, and what I consider reasonable doubt

1 and no doubt. I don't know.

2 Q. Okay.

3 A. I can be honest with you. I just don't know.

4 Q. I hope you understand why I'm going --

5 A. I understand and I know it's very important
6 and I'm trying to answer. It would be real easy for me to
7 say yes, I could do it, or no, I couldn't do it, because I
8 really don't know. I've never been in the situation. But I
9 would have to feel like the circumstances and the law met
10 together.

11 Q. If you think we proved the case to you beyond
12 a reasonable doubt and proved these Special Issues to you
13 beyond a reasonable doubt, do you think, just beyond a
14 reasonable doubt, not beyond all doubt, but beyond a
15 reasonable doubt, do you think you could answer the
16 questions in such a way that would result in a death
17 penalty?

18 A. Yes.

19 Q. Okay.

20 A. I think I could.

21 Q. Okay. We've talked a little bit about these
22 questions, these Special Issues. I know you've gotten a
23 chance to read them, but they're phrased a little bit
24 differently up on the wall. If you'd just take a minute or
25 two and look at those so we can visit about them briefly.

1 A. (Prospective juror complies.)

2 Q. Did you get a chance to look at those, Ms.
3 Liston?

4 A. Yes.

5 Q. Okay. These are the questions, again, that
6 you get to in that second phase of the trial, the punishment
7 phase. That first issue basically deals with whether the
8 person is a future danger. The question says whether there
9 is a probability that they would commit criminal acts of
10 violence that would constitute a continuing threat to
11 society. Does that question kind of make sense to you as
12 you look at it?

13 A. Yes.

14 Q. Do you see how it kind of asks a juror to make
15 a prediction about future events?

16 A. Yes.

17 Q. Okay. Do you feel like you're the type person
18 that could make that prediction? Some people tell us they
19 can, some people tell us they can't, they're not
20 comfortable, kind of, I guess, predicting future behavior.
21 But what do you think about yourself?

22 A. You predict the future behavior on the past
23 behavior?

24 Q. If you had enough information, maybe past
25 history.

1 A. Yes.

2 Q. Okay. What does that word "probability" mean
3 to you? It doesn't necessarily have a legal definition, so
4 we ask each juror kind of how they define that word
5 "probability."

6 A. If there's any chance that a criminal act
7 would be performed again.

8 Q. Okay. And we hear that a lot. The law gives
9 us a little bit of guidance. It says, you know, it's
10 something less than a certainty, because we could never
11 prove anything to be a certainty. But it's something more
12 than just a possibility, I guess, because everything is
13 possible. You said, you know, a chance it would happen
14 again. Does that make sense to you, that type of
15 definition? Are you comfortable with that?

16 A. Probability, chance, yeah, yes.

17 Q. Okay. When you see that phrase, kind of in
18 the middle sentence or in the middle line, "criminal acts of
19 violence." Again, that law doesn't necessarily define about
20 which type of crimes or what type of acts that means. So we
21 ask every juror kind of as you sit there and look at that
22 phrase, "criminal acts of violence," what does it mean to
23 you?

24 A. Breaking the law.

25 Q. Okay.

1 A. Whether it be rape, whether it be theft,
2 robbery, aggravated assault, breaking the law.

3 Q. Okay. And then finally the last word in that
4 question, "society." Again, that's not really defined for
5 us legally. We ask everybody to kind of how you would
6 define "society".

7 A. Society is whoever you are in contact with,
8 whether it be the people you work with or the people you
9 live with, the people you're around.

10 Q. Everybody and anybody you may come into
11 contact with?

12 A. Yes.

13 Q. What about people behind bars? You know,
14 prison guards, wardens, that type thing?

15 A. Yes.

16 Q. Okay. That makes sense to you?

17 A. Yes.

18 Q. Okay. You told us earlier when you look at
19 that question, I guess it would be important to know the
20 past history.

21 A. Yes.

22 Q. Anything else you think might be important as
23 you're trying to answer that question?

24 A. I guess the types of violence that was
25 involved, whether they pleaded guilty, whether they were

1 involved with other people in the acts and the crimes.

2 Q. Okay. The law says when you get to answer
3 these questions, you know, you can go back and look at what
4 happened in the first part of the case, the crime they're
5 charged with. And in the second part, you know, you get to
6 hear about his history and that type of thing to help you
7 answer that.

8 A lot of people tell us when we talk
9 about this question that, you know, hey, if I've convicted
10 someone of capital murder, okay, if I've already decided in
11 that first phase that they're guilty of capital murder, that
12 first question, Special Issue No. 1, is answered to me. If
13 I've convicted him of capital murder, I'm always going to
14 think there's that probability of a future danger. In a
15 sense it's kind of a common sense proposition. You kind of
16 see what I'm saying?

17 A. Yes.

18 Q. What do you think about that?

19 A. I think somebody could kill somebody by
20 accident and it be a capital murder case and it be a
21 first-time incident.

22 Q. Okay. Let me stop you right there. If you
23 are talking about a death that's caused accidentally?

24 A. Yes.

25 Q. If you accidentally kill someone, that's not a

1 crime of any type.

2 A. In carrying out another crime?

3 Q. Well, you would have already probably found
4 him 'guilty of capital murder at this point. See what I'm
5 saying?

6 A. Yes, sir.

7 Q. I don't know. What situation do you have in
8 mind? I'm not sure we're on the same wavelength.

9 A. Well, I was thinking about past criminal acts.
10 If this was the first time, say it was negligent or they
11 were drunk and they ran over a police officer and killed
12 him.

13 Q. Okay. Let me back up just a little bit and
14 maybe this will help our discussion. Murder in Texas is the
15 knowing or intentional taking of a life without legal
16 justification or excuse, okay? If you kill somebody in
17 self-defense, it's not murder. If you kill somebody
18 accidentally, it's not murder, okay?

19 A. Okay.

20 Q. So the situation you described probably
21 wouldn't be murder. It sure wouldn't be capital murder.
22 Does that make sense?

23 A. Yes.

24 Q. We're always talking about that knowing or
25 intentional taking of a life, not in self-defense, not

1 accidentally. That's where capital murder starts. We've
2 got to prove that and prove some other element, like, say,
3 in the course of a robbery. Does that kind of clear things
4 up for you a little bit?

5 A. Yes, I guess. But if they were an accomplice
6 to that case and they wasn't actually involved in another
7 case.

8 Q. Okay. So if they were an accomplice in the
9 capital murder and they didn't have any criminal history?

10 A. Yes.

11 Q. Okay. You could see where you might answer
12 that question no?

13 A. Yes.

14 Q. Okay. And that's kind of what the law
15 anticipates, that you keep an open mind to all these
16 questions in the second phase. The answer to that question
17 starts off with a no and it's up to us to prove it to you
18 that it should be a yes. That second Special Issue, that
19 kind of deals with kind of what we've already talked about,
20 that accomplice situation.

21 Just to focus your attention on that last
22 line in that question, anticipated that a human life would
23 be taken. If you remember what we talked about a second
24 ago, in order to find an accomplice guilty of capital
25 murder, we'd have to prove to you that they should have

1 anticipated, you know, a life would be taken, okay? Should
2 have anticipated. When we get to punishment, what the law
3 says, and we've got to prove to you not only that they
4 should have anticipated, but they actually anticipated.

5 And the law says that's a different
6 standard and a higher standard. And there's some people,
7 very frankly, that said, you know, should have anticipated
8 and anticipated to me are pretty much the same thing. I'm
9 wondering if you kind of see a distinction between those two
10 or where you are on that issue.

11 A. I think that would be the State's
12 responsibility to prove to me that he did anticipate it.

13 Q. And that's what we have to prove in
14 punishment. But do you see a difference between the two
15 standards, between should have anticipated and actually
16 anticipated?

17 A. Not really.

18 Q. Okay. A lot of people tell us that. They say
19 you're kind of playing word games or parsing words with me.
20 The law says there's a difference. It says it's actually a
21 higher standard. Some people, like you, say that to me, for
22 all intents and purposes, it's the same standard. If the
23 State has proven to me in the first part of the trial that
24 they should have anticipated, then that question is already
25 answered for me, because I think should have anticipated and

1 did anticipate are the same thing.

2 That's kind of what I hear you saying.
3 And I don't want to put words in your mouth. Is that what
4 you're saying?

5 A. Yes.

6 Q. Okay. So if you found somebody should have
7 anticipated death in the first part of the trial, because
8 there's no difference between the standards, you would have
9 already answered that question in your mind? They did
10 anticipate; is that right? That question would already be
11 answered for you?

12 A. Yes.

13 Q. Okay. Fair enough. If those two questions
14 are answered yes, then we kind of move to this third issue,
15 which is kind of the mitigation question. We kind of
16 already touched on it a little bit, what it means,
17 background, and that type of thing. And we just kind of ask
18 a juror to step back, look at everything they've heard, the
19 crime, everything they've heard about the person, and see if
20 there's something there that kind of reduces his moral blame
21 such that his life ought to be spared, and he shouldn't be
22 given the death sentence. Does that kind of make sense?

23 A. Yes.

24 Q. Okay. Some people tell us very frankly,
25 because this is the last step in that process towards the

1 death penalty, some people tell us, hey, I found a person
2 guilty of capital murder in the first phase. I found he's a
3 future danger. I've answered No. 1 yes. I found he should
4 have anticipated and did anticipate. No. 2, I've answered
5 that yes.

6 By that time, by that kind of late point
7 in the process, my mind is pretty much made up. That's it.
8 You know, if we've gotten this far in the process, there's
9 nothing kind of that's going to turn me around, that I'm,
10 you know, going to consider a life sentence instead of a
11 death sentence at that point. What do you think about that?

12 A. I think I would have to hear all the
13 circumstances.

14 Q. Okay. That's pretty much what the law says.
15 You can keep an open mind. Do you kind of see a value in
16 that question or having that question?

17 A. Yes.

18 Q. Okay. Is there anything that pops into your
19 mind that you would consider mitigating?

20 A. I just, I really believe that an environment
21 and how a person was raised and placed determines their
22 outcome of their life.

23 Q. Okay. What do you think about a person's age?
24 By that, I mean, some people think that it might be
25 mitigating, if a person was fairly young when they committed

1 the crime. Some people say it's not. You're old enough to
2 make a choice. It's not mitigating. I'm just curious what
3 you think about that.

4 A. This day and time, there's an awful lot of
5 young people making very poor decisions and committing very
6 serious crimes. And I think it depends on the individual.
7 Some people are a lot more mature and have been raised in an
8 environment where they have the opportunity and the -- what
9 they need to make better decisions and some are not.

10 A person is raised in a violent
11 environment, sees things that they do, I believe, in
12 everyday life as norm; whereas, people that are not raised
13 in that do not see it as norm.

14 Q. When you're answering a question like that,
15 looking into a person's background, do you think you might
16 want to hear from that person, the criminal, the person
17 charged? Do you think that would be helpful?

18 A. It might.

19 Q. Okay. Would you need to hear from him? I
20 mean, I guess we would all want to, but would you need to
21 hear from him in answering that question?

22 A. I feel like that's the attorney's
23 responsibility to give me the circumstances.

24 Q. And that's basically what the law is. You
25 know, the State always has the burden of proof. These folks

1 don't have to do a thing. The person charged with the crime
2 doesn't have to testify, you know, on his behalf. But you
3 feel comfortable answering those three questions, even if he
4 doesn't testify; is that right?

5 A. Yes.

6 Q. Okay. Let's see. Any questions about this
7 scheme we have, kind of how it's set up or what the
8 definition of murder is again? I don't know if I was real
9 clear on that.

10 A. I read through it and I know what the law is.
11 But -- and I know when I go back to some of my questions
12 here -- and I understand the law is if it's a police
13 officer, it's an automatic capital. I don't know that I
14 believe that should automatically be. I don't know that I
15 believe a police officer's life is more important than an
16 individual, any individual's life.

17 Q. Okay. A lot of people tell us that.

18 A. And I think that that's one of the problems in
19 our system, whether somebody chooses to go into law
20 enforcement and we do appreciate that they're in law
21 enforcement. But that does not make them a better person,
22 obviously, by some of the things that have come out lately.
23 Just because they are in that, does not mean they are better
24 people.

25 Q. Okay. Fair enough. When you think of a death

1 penalty case, what do you have in mind? I know we talked
2 about Darlie Routier's case. Taking that out, maybe taking
3 the policeman aspect out, what kind of case do you have in
4 mind?

5 A. I think, well, intention. When they go in and
6 they make the decision to take a life at that time when
7 there's another decision that could be made.

8 Q. Okay. You'd want that intent?

9 A. Yes.

10 Q. Okay. I kind of -- I hate to backtrack on
11 you.

12 A. I know.

13 Q. You're going to think it's a lawyer playing
14 word games and I hate that, but, I mean, we kind of get back
15 to that conspiracy deal with the accomplice that didn't have
16 any intent.

17 A. Yes.

18 Q. You know, you told us you kind of, I guess if
19 you were Governor for a day, you wouldn't just single out
20 police officers. If you were Governor for a day, would you
21 kind of take that conspiracy aspect out and make it to where
22 the only person who'd be eligible for the death penalty is
23 somebody that intended a death? That intent sounds
24 important to you.

25 A. Intent is important to me.

1 Q. Okay. Was that the way you could write the
2 law? If we left it up to you, would you have this
3 conspiracy business with no intent or --

4 A. Well, I think if a person, in conspiracy I
5 think of maybe somebody that goes out and says, I want you
6 to take this person's life. They definitely should be, get
7 the death penalty right along with the person that pulled
8 the trigger.

9 Q. And we have -- we call that the law is murder
10 for hire.

11 A. Okay.

12 Q. I want to hire somebody to kill my wife or my
13 business partner. And that is a capital murder case. But
14 that's something a little bit different than conspiracy.

15 A. Yeah. Well, I guess maybe mine, I'm not
16 involved with the law. I've never been in jail or anything,
17 so I don't know a lot of the laws, but, you know, that was
18 my perception of it.

19 Q. It's a good thing you don't have more
20 experience in this area. I'm just trying to really feel,
21 get a feel from you if you're comfortable in a case like
22 this where you're talking about an accomplice and conspiracy
23 and possibly giving the death sentence to somebody that had
24 no intent, somebody who didn't pull the trigger and had no
25 intent. That's kind of really the bottom line question and

1 only you can answer that.

2 A. I don't think I could give them the death
3 penalty, if it was proven that they did not have the intent
4 and they did not pull the trigger and it was not proven to
5 me that they pulled the trigger. I think I would have a
6 difficult time giving them the death penalty.

7 Q. Okay. It sounds like something, now that
8 you've thought about it, you kind of believe very strongly
9 about.

10 A. Well, I've always, taking a life is not easy,
11 whether for me would it be the death penalty and it's the
12 law and they're sentenced, it would be very difficult, even
13 though I do believe in the death penalty.

14 Q. Sure.

15 A. I still feel that I would have to be -- you
16 would have to present a good enough case to me so that there
17 was no reasonable doubt that he had the intention when they
18 went in there and that they knew that a murder could result.

19 Q. Okay. When you're talking about an accomplice
20 like a conspiracy that didn't have any intent. It sounds
21 like that's something you disagree with, kind of
22 intellectually and morally; is that right?

23 A. Yes.

24 Q. And it sounds like that's something that
25 would, I guess, substantially impair your ability to be a

1 juror in this case, just because you really don't believe in
2 that aspect of the law? It would be hard for you to
3 sentence somebody to death and that would just kind of
4 impair you, if you were to be a juror on this case; is that
5 right?

6 A. If you did not prove to me that he had that
7 intent, I could not give him the death penalty. You would
8 have to prove your case to me.

9 Q. Okay. So just somebody that was a
10 conspirator, that didn't have any intent, you just couldn't
11 give them the death penalty; is that right?

12 A. Yeah. If you didn't prove it to me, I
13 couldn't give them the death penalty.

14 Q. Okay. Didn't prove to you that he had intent
15 that somebody die; is that right?

16 A. That he had that intention and that he knew of
17 that that someone was going to take a life when they went in
18 there or came out.

19 Q. That kind of premeditation, I guess we're
20 going back to?

21 A. Yes.

22 Q. You'd want to see premeditation on somebody's
23 part, whether it was the triggerman or the nontriggerman
24 before you could assess a death sentence?

25 A. The accomplice would have -- I think the

1 accomplice would have to, if he was aware that this person
2 had committed these type of crimes in the past and he knew
3 that it could happen again, especially if they had guns,
4 then that is, would be to be proving it, he had that
5 intention, he knew that, he could make that decision, he's a
6 person that could chose to stay with those people, to be
7 with those people at that time, knowing that something could
8 happen.

9 Q. Okay. Again, I don't want to put words in
10 your mouth.

11 A. I know. And I'm trying to answer as honest as
12 I can with you, because I know it's critical.

13 Q. I know. It sounds like unless we prove to you
14 beyond a reasonable doubt that that accomplice had the
15 intent that somebody die, you could not return a death
16 sentence. I think cutting through --

17 A. Yes.

18 Q. That's kind of what you are saying?

19 A. Yes.

20 Q. Okay. Fair enough. I almost hate to ask
21 this, but do you have any questions of me?

22 A. No, I don't think so.

23 Q. Okay. Let me check with my buddy here real
24 quick. Ms. Liston, thanks for your time. That's all I
25 have, Judge.

1 MR. SANCHEZ: May I proceed, Your Honor?

2 THE COURT: Mr. Sanchez.

3 MR. SANCHEZ: Thank you.

4 CROSS-EXAMINATION

5 BY MR. SANCHEZ:

6 Q. Ms. Liston, are you tired of answering
7 questions already?

8 A. No, I'm just nervous.

9 Q. You want me to stop talking?

10 A. No, just nervous, because I want to answer
11 truthfully and honestly with you.

12 Q. We know you've been truthful up to this point
13 and I'm sure you're still going to be truthful. And I don't
14 want you to feel bad because of the things you've been
15 telling us. I mean, sometimes people think they're, you
16 know, they're sitting up there and they're on trial. But,
17 you know, this process is to find out what you think about
18 the law.

19 But I also want to, you know, just tell
20 you that, you know, a lot of the way that you feel is the
21 way the law is set up. In any criminal case, I mean, you're
22 not supposed to take somebody's liberty unless the State
23 proves their case to you beyond a reasonable doubt. And it
24 sounds to me that's the way you feel, right?

25 A. Yes.

1 Q. Before you would convict anybody of capital
2 murder, the State would have to have a good case and
3 convince you beyond a reasonable doubt that they're guilty,
4 just the way they have alleged it; isn't that correct?

5 A. Yes.

6 Q. And that's what the law is. And that's what
7 the Judge would tell you, you have to do. You have to sit
8 in that jury box and be basically unconvinced until they can
9 convince you otherwise. And it sounds to me that that's
10 your posture, especially in a case like this where the death
11 penalty may be involved. Would I be fair in saying that?

12 A. Yes.

13 Q. That's the way you feel?

14 A. Yes.

15 Q. Okay. And naturally the death penalty law,
16 the scheme is set up so it's not an automatic death penalty
17 every time someone is convicted of a capital murder. In
18 other words, the law favors life sentences instead of death
19 penalty sentences unless, like you said, the State proved to
20 you these Special Issues No. 1 and 2 beyond a reasonable
21 doubt. So, what I hear from you is basically the way the
22 law is set up. But -- so don't feel bad about it, the way
23 you've been answering your questions, okay?

24 I did want to go over a couple of things,
25 though, that you talked about. You had indicated that you

1 may not see the distinction between should have and actually
2 -- should have anticipated or actually anticipated. To you
3 that may not be a big difference or you couldn't see the
4 distinction.

5 And the way I explain it sometimes, I
6 have three boys at home, okay? They're five and a half,
7 three and a half, and one is a three month old, so he can't
8 get in trouble yet. But one day I was walking in, I heard
9 -- I was walking by their room and I heard something like
10 the little one is called -- his name is Sammy and the oldest
11 one is Nico. And I heard Nico saying, are you ready, Sammy?
12 Are you ready? And it didn't sound right, so I kind of
13 walked in there and I saw the oldest one on top of a book
14 shelf. And as soon as I walked in, he jumps off the book
15 shelf right onto the little one who's laying down on the bed
16 like they were wrestling or something.

17 He put the knee right into his ribs. And
18 I was like, I just ran in there and I said, what are you
19 doing? And the oldest one was just startled and said, what
20 did I do wrong? And the little one is crying by that point
21 because he's hurt. And I said, can't you see that was going
22 to hurt him? Didn't you anticipate that that was going to
23 hurt him when you jumped on him? And he was like, no, I
24 didn't think it would hurt him. I really did not
25 anticipate. And I said, well, you should have anticipated,

1 okay?

2 And I tell that story just to kind of
3 show you what the difference is between should have
4 anticipated and actually anticipated. In his mind he
5 probably should have anticipated that was going to hurt him,
6 like most people who are grown up. But in his mind, he
7 didn't anticipate. You see the difference now?

8 A. Yes.

9 Q. Between actually anticipating and should have
10 anticipated? And it's the same thing in this case, in
11 answering Special Issue No. 2, and also in finding someone
12 guilty of capital murder as an accomplice. In other words,
13 to find somebody just guilty of capital murder as an
14 accomplice they have to prove to you that they should have
15 anticipated that a life would be taken. Does that make
16 sense?

17 A. Yes.

18 Q. Okay. And, but, in order for them to get you
19 to answer Special Issue No. 2 as yes, they have to prove to
20 you that that person actually anticipated that a life would
21 be taken. You see how that's a different question that they
22 have to prove to you beyond a reasonable doubt? Can you see
23 the distinction on that?

24 A. Yes.

25 Q. Okay. So if you were placed on this jury,

1 then you could make that distinction?

2 A. I think so. But like in your story, you said,
3 you're dealing with a child that does not always know right
4 from wrong and has not grown up, whereas an adult would know
5 that that would hurt a child.

6 Q. But you can see the distinction that they
7 would have to prove?

8 A. Yes.

9 Q. Okay. And you can follow that law?

10 A. Yes...

11 Q. Okay. And Special Issue No. 3, you've also, I
12 think you basically told us that you do see value in that
13 question; is that correct?

14 A. Yes.

15 Q. The way the scheme is set out that's basically
16 the last step before someone would receive the death
17 penalty. And it's kind of like a safety net. In other
18 words, you know, just because you found somebody guilty of
19 capital murder, just because you found that they're a
20 continuing threat to society, and just because you found
21 that they anticipated a human life would be taken, Special
22 Issue No. 3 allows you to find something in the case,
23 something about the person, something about their
24 background.

25 I mean, I can't tell you what that would

1 be, but something maybe in the way the actual capital murder
2 occurred. Who knows? It might be something that you hear
3 that tells you, well, yeah, I find all these questions to be
4 answered that way, but I find something that's mitigating
5 sufficiently that I'm going to spare this person's life.

6 And that's the way Special Issue No. 3 is basically set up.

7 And I think you've told us that you find a lot of value in
8 Special Issue No. 3?

9 A. Yes.

10 Q. Okay. I do want to clear up one thing. The
11 State was asking you about you needing the intent to give
12 somebody the death penalty as an accomplice. I want to just
13 explore that a little bit more. Would you need that intent
14 to find somebody guilty of capital murder to begin with?

15 In other words, there was an accomplice
16 situation under a conspiracy theory, like they were
17 explaining to you, that, would you need the intent just to
18 find him guilty or would you need that intent to decide
19 whether they are deserving of the death penalty or not?

20 A. I don't really understand your question.

21 Q. I know, I --

22 A. I don't understand what you're getting to.

23 Q. It doesn't make sense to me either. Why don't
24 you explain to me as far as what you thought was important
25 as far as intent in deciding a case like this. Explain that

1 to me, because I think the problem is I didn't understand
2 what your feelings were as far as that was concerned.

3 A. As an accomplice?

4 Q. Yes.

5 A. That the accomplice went in with the intent or
6 knowingly that someone had the intent or would, there's a
7 possibility that a life would be taken. I think that's part
8 of intent.

9 Q. Okay.

10 A. That it's a decision a person is making and
11 choosing to make at that point.

12 Q. Okay. So you could follow the law, then, the
13 way it's been explained to you up until this point as far as
14 that's concerned?

15 A. Yes.

16 Q. Do you have anything you want to ask me or you
17 want me to just step down?

18 A. No, no, no, no.

19 Q. I think those are all the questions I have
20 here.

21 A. I would like to say to both and to the Judge
22 that this would be a very difficult decision for me to make.
23 I feel like I could make the decision, but it wouldn't be
24 something that I took lightly, but that it would be a
25 difficult decision. Just like other people, it's better to

1 let somebody else do it and you sit back and say you believe
2 it. But to take a life is very critical and very important.
3 That's all I have to say.

4 THE COURT: Ms. Liston, I have a question
5 for you.

6 PROSPECTIVE JUROR: Yes, sir?

7 THE COURT: Looking at the whole scheme
8 of things, I want to listen to you talk a little bit more.
9 If someone is found guilty of capital murder, and there are
10 eight different examples of capital murder, what are the two
11 possible outcomes for punishment?

12 PROSPECTIVE JUROR: The death penalty or
13 life in prison.

14 THE COURT: And how does one end up with
15 a death penalty?

16 PROSPECTIVE JUROR: That they went into
17 this crime knowing that a life could be taken or they took a
18 life.

19 THE COURT: What mechanism do we use to
20 impose the death penalty? What does a jury, what are the
21 mechanics of how the sentencing goes?

22 PROSPECTIVE JUROR: They're found guilty
23 beyond a reasonable doubt and then we go to the three
24 questions.

25 THE COURT: All right. Who has the

1 burden of proof on Special Issue No. 1 and Special Issue No.
2 2?

3 PROSPECTIVE JUROR: I feel like the
4 State.

5 THE COURT: All right. And you've told
6 -- you've given me a couple of different answers. That's
7 why I'm asking, just to clarify. I'm not going to put words
8 in your mouth at all. Explain Special Issue No. 2 to me.

9 PROSPECTIVE JUROR: That the person went
10 into this crime with the understanding that a life could be
11 taken or that in the execution of the crime that there was a
12 possibility of a life could be taken.

13 THE COURT: Now, that's where we're
14 having a little problem.

15 PROSPECTIVE JUROR: Yeah, I'm having a
16 little problem with it, too.

17 THE COURT: You used the words "could be"
18 and "possibly taken." I need to have you focus on the
19 actual language of No. 2.

20 PROSPECTIVE JUROR: Okay. To me, if the
21 person went in, and it's easy to say if he went in with a
22 gun and shot him, he intended to kill the person.

23 THE COURT: There are three parts to
24 Special Issue No. 2. The first part is easy.

25 PROSPECTIVE JUROR: That's easy.

1 THE COURT: He went in, he was the
2 gunman, that's done.

3 PROSPECTIVE JUROR: Or he went in and the
4 other person went in with a gun and knew that there was a
5 possibility that someone would be killed, but intended to
6 kill the deceased or another person intended to kill a
7 person. And then the anticipated that a human life could be
8 taken, if they go in with guns and they're there in a crime
9 and someone confronts them, a reasonable person should
10 realize that a life could be taken and should anticipate
11 that there's life that could be taken.

12 THE COURT: So you understand there are
13 three different categories?

14 PROSPECTIVE JUROR: Yes.

15 THE COURT: You understand on Special
16 Issue No. 3 there's -- no one has the burden to bring you
17 evidence on that? You can look at the whole trial. The
18 defense may present evidence. They're not required to. The
19 State doesn't have to prove it to you. It's just a step
20 back, look at everything again, take into consideration all
21 of the evidence.

22 PROSPECTIVE JUROR: All the testimony and
23 evidence.

24 THE COURT: So let me ask a global
25 question. If you have found someone guilty of capital

1 murder, as a hypothetical juror, could you return a life
2 sentence, if the facts warranted it?

3 PROSPECTIVE JUROR: Yes.

4 THE COURT: If you were a juror in a
5 capital murder case where the jury found the defendant
6 guilty of capital murder and the facts dictated it, could
7 you return a death sentence, answering those issues in such
8 a way that would result in a death sentence?

9 PROSPECTIVE JUROR: I believe I could.

10 THE COURT: I believe. Now, we've been
11 through this for an hour and a half. You have told us it
12 would be very difficult. I'm not comfortable. This is the
13 one and only question. Either you can follow the law or you
14 can't follow the law.

15 PROSPECTIVE JUROR: I can follow the law.

16 THE COURT: And if the law resulted in a
17 death sentence, you're telling me you could do that?

18 PROSPECTIVE JUROR: Yes. If the law and
19 the State proved it beyond a reasonable doubt, I could.

20 THE COURT: Thank you, Ms. Liston. If
21 you will wait for us outside just for a few minutes and
22 we'll have you back in.

23 [Prospective juror out]

24 THE COURT: What says the State with Ms.
25 Liston?

1 MR. WIRSKYE: The State challenges
2 Ms. Liston on several grounds, Your Honor. Number one, as a
3 vacillating juror. When we get to Special Issue No. 2,
4 talking about whether she sees a distinction between should
5 have and did actually anticipate. She answered me one way,
6 was very clear in her answers. She answered Mr. Sanchez
7 another way.

8 And I believe, especially based on her
9 demeanor and the Court observing her and her grasp of the
10 Special Issues and the issues involved and the precise legal
11 definitions, we believe she's disqualified under 2. She
12 can't see that distinction.

13 We also believe her views on the death
14 penalty are such that she is substantially impaired in
15 returning a death verdict, kind of unsolicited at the end of
16 the defense voir dire, she made that point to everyone in
17 the courtroom, and especially looking at the prosecution. I
18 believe she told me she'd be substantially impaired in
19 returning a death verdict based on her beliefs on the death
20 penalty.

21 Then, finally, we challenge her on an
22 inability to follow the law, an aspect of the law, upon
23 which the State is entitled to rely, that means,
24 specifically, the parties conspiracy. She told me in order
25 to convict and get a death penalty, that she would need

1 intent on the part of the accomplice. And we believe she's
2 holding the State to a higher burden than that, which is not
3 the law when it comes to the parties conspiracy. We
4 challenge her on those grounds, Your Honor.

5 MR. SANCHEZ: Would you like me to
6 respond, Judge?

7 THE COURT: Go ahead.

8 MR. SANCHEZ: First of all, when it came
9 to her distinction between should have anticipated and
10 actually anticipated, the law was never explained to her at
11 that point. Distinction was never made as to what the State
12 had, which one the State had to prove under Issue No. 2. I
13 think once we questioned her, she indicated that she saw the
14 distinction. And we asked her if the State had to prove to
15 you that the person actually anticipated to you a life would
16 be taken, she understood that and she said she could do it.

17 As far as her feelings for the death
18 penalty, the only thing she indicated was that she wouldn't
19 take it lightly. She never said it would impair her being a
20 fair juror. As a matter of fact, that's the kind of juror
21 you need, is someone who wouldn't take it lightly and take
22 it seriously, just as the law does. So, as far as that
23 goes, she just said it's something she wouldn't like doing,
24 but if she had to, she would, and she could follow the law.

25 As far as the law of parties, I think the

1 Court did a good job in getting her to explain what she
2 believed and I think the Court straightened that out and she
3 could follow the law in that regard, also.

4 THE COURT: The Court, in looking at all
5 these jurors, obviously would like to have someone very well
6 educated and understand the law when they walk in the door
7 or we wouldn't need this process. I think the record is
8 quite clear, at the end of the day, I'm looking at the
9 juror's comprehension of the entire package, asking a juror
10 if they can give it back to me.

11 Though she struggles with the issues, she
12 was able to give it back to me, understanding there are
13 differences and the State is required to prove those
14 differences to her. Once again, only a marginal juror, but
15 I do find this juror to be qualified.

16 MR. WIRSKYE: State will exercise a
17 preemptory, Your Honor.

18 THE COURT: Yes, sir. Please ask Ms.
19 Liston to come back in.

20 [Prospective juror in]

21 THE COURT: Ms. Liston, you get to enjoy
22 the rodeo and not have to worry about coming back on that
23 red-eye flight that Monday morning. You are excused. Thank
24 you very much.

25 PROSPECTIVE JUROR: Thank you very much.

1 [Prospective juror out]

2 THE COURT: Mr. Walter W. Thomas.

3 [Prospective juror in]

4 THE COURT: Good afternoon, sir. How are
5 you?

6 PROSPECTIVE JUROR: Doing fine, sir.

7 THE COURT: We've got juror No. 2330,
8 Mr. Walter W. Thomas. Good afternoon, Mr. Thomas.

9 THE COURT: How are you doing, sir?

10 THE COURT: Doing fine. Sorry for the
11 delay in getting in. I take people as they come in order
12 and you were number two getting in this afternoon, so we put
13 you on second and that's just the best we can do. We don't
14 know if we're going to visit with someone for a long time or
15 what, so I apologize for the delay. We have to balance
16 about fifteen people against three, so you see where I am.
17 We'll be here all day, I can assure you.

18 PROSPECTIVE JUROR: I understand.

19 THE COURT: Mr. Thomas, did you have an
20 opportunity to read the guide I provided for you?

21 PROSPECTIVE JUROR: I did.

22 THE COURT: I know that's a lot of law we
23 give you. And I also gave you a copy of the questionnaire
24 that you filled out in May to help you begin to think about
25 these issues once again. And we don't expect you to

1 understand everything at this point. That's what the
2 lawyers are going to visit with you about and help you
3 understand the law and how it all relates.

4 At the end of the process I have two
5 questions to ask you. Number one is do you understand the
6 law? And, number two, can you follow the law, big picture.

7 PROSPECTIVE JUROR: Okay.

8 THE COURT: That's what this whole
9 process is all about. Now, the only question I have for you
10 at this time from the Court is will you be able to serve
11 this Court for a period of two weeks beginning on November
12 10th?

13 PROSPECTIVE JUROR: Yes.

14 THE COURT: Very well. Mr. Shook, would
15 you like to inquire?

16 MR. SHOOK: Yes, Judge.

17 WALTER THOMAS,
18 having been duly sworn, was examined and testified as
19 follows:

20 DIRECT EXAMINATION

21 BY MR. SHOOK:

22 Q. Mr. Thomas, my name is Toby Shook. I'm going
23 to speak to you on behalf of the State this afternoon. And,
24 as the Judge said, there aren't any right or wrong answers.
25 We just want your honest opinions. I'm going to follow up

1 with some of the information you provided for us in the
2 questionnaire, talk to you about capital murder, the death
3 penalty, some of the rules that apply in these types of
4 cases.

5 Looking over your questionnaire, I see
6 that you're retired and you used to work for British
7 Petroleum; is that right?

8 A. Yes. Amoco, which was bought by British
9 Petroleum, yes.

10 Q. Okay. So, what exactly did you do with Amoco?

11 A. I was in the information technology area in
12 various capacities of programming, project management,
13 supervision.

14 Q. Okay. I notice that you've lived different
15 places, several different places in Texas, I know. What --
16 did you ever live overseas?

17 A. Only while deployed in the Navy, I was
18 overseas. And that's the only time I've actually -- I
19 wasn't actually living there at the time. I was --

20 Q. The rest of the time you've been in various
21 cities in Texas?

22 A. Texas, Oklahoma, and Tulsa for quite a few
23 years.

24 Q. Okay. All right. And now, what brought you
25 to Dallas? I see you've been in Dallas the last couple of

1 years?

2 A. About three, it looks like now, close to
3 three.

4 Q. How did you wind up here in Dallas?

5 A. Well, my wife grew up here for one thing. My
6 mother lives here. My children live here. My sister lives
7 here.

8 Q. So all your family?

9 A. Most of my family was here.

10 Q. Had already made it here before you?

11 A. They got here before I did.

12 Q. Okay. And I see that some of your hobbies,
13 one of the types of things you do is volunteer work. And I
14 flipped the page over and it said with the Red Cross. What
15 do you do with them?

16 A. Well, I had been helping them out with -- they
17 had a program where they install for elderly people or
18 invalids where they would have this medical device that they
19 would attach to them. And all they had to do was push a
20 button and I helped them by installing that for them on a
21 volunteer basis.

22 Q. I saw in 1975 you had been on a jury. Is that
23 the only jury you've been on?

24 A. Yeah. And that was -- I don't even remember
25 what year it was, but it was quite a few years ago. That

1 was in Tulsa.

2 Q. Well, you estimated about 1975.

3 A. That's probably close.

4 Q. It was a child molestation case and the
5 punishment was forty years?

6 A. It was a child molestation. They were found
7 guilty. The sentencing was out of our hands.

8 Q. Okay.

9 A. It was a third time. After the sentencing, or
10 after the guilt and innocence, the Judge then, it was a
11 three-time loser. Sentencing was done by the Judge.

12 Q. Okay. Was that in Texas or Oklahoma?

13 A. That was Oklahoma.

14 Q. Okay. How did that experience go with you?
15 Was there any problems with the evidence or discussions in
16 the jury room, any major arguments or disagreements? Or did
17 it go pretty smoothly?

18 A. There was quite a bit of discussion. I don't
19 know that there was arguments, per se. I presume it was
20 after quite a bit of discussion we arrived at a decision.

21 Q. Not, I take it, then, it wasn't a negative
22 experience on your part?

23 A. No. I mean, it was my first experience in
24 participating in a court setting and I found it interesting.

25 Q. Okay. Let's talk for a minute, then, about

1 capital murder. You put on your questionnaire that you feel
2 that the death penalty, you're in favor of it as a law, and
3 I'd like you to kind of expound on that. Tell us in your
4 own words why you favor the death penalty as a law, the
5 purpose you feel the death penalty serves society.

6 A. Well, it's --for one thing they will never be
7 out on the street again. I mean, once they've committed an
8 offense that deserves the death penalty, I'd like to make
9 sure, if I were in a position to do so, make sure they never
10 have another opportunity to do so.

11 Q. Okay. So a deterrence?

12 A. Deterrence is probably a big part of it, yes.

13 Q. Okay. Has it been a law that you've been in
14 favor of ever since you've been an adult as far as you can
15 recall?

16 A. When I was young I'm not sure I felt one way
17 or the other. I didn't think about it much, I guess.
18 Probably as I've gotten older I may have clarified in my
19 mind, you know, that, how I felt about it.

20 Q. From your own personal point of view, what
21 types of crimes do you think should come into consideration
22 for the death penalty?

23 A. Um, that's a tough one there now, but I would
24 assume they'd have to be a crime that deprived somebody of
25 their life, you know. That would be obviously one thing.

1 If they knowingly take someone else's life, I feel like
2 society has a right to take theirs.

3 Q. Okay. If it were up to you, would you have
4 the death penalty or at least consideration of the death
5 penalty for crimes other than murder or when a life is
6 taken?

7 A. Can you rephrase that question?

8 Q. If it were up to you.

9 A. If it were up to me?

10 Q. Would you have the death penalty as an option
11 in some crimes other than murder? Some people tell us
12 sometimes in a child molestation case, sometimes in a rape
13 case, just depending on the facts. Other people would
14 reserve it just when a life is taken.

15 A. I'm not sure I can rule out other things,
16 although the murder is the first thing that comes to mind
17 where I feel like it's deserved, but --

18 Q. Have you ever followed any cases in the media
19 locally, nationally, that you thought should be considered
20 for the death penalty or perhaps were being pursued as a
21 death penalty case that you can recall?

22 A. That I felt should be the death penalty?

23 Q. Should be or at least considered or an option
24 or something of that nature?

25 A. I don't recall any specifically right now.

1 Well, okay, I guess I take that back. I can recall one case
2 there. I don't know whether it was a death penalty
3 situation or not, but there was certainly a case that was in
4 the news, heard in California, that the defendant got off.

5 Q. Is that the O. J. case?

6 A. That is O. J. Simpson.

7 Q. Almost every juror we talk to when we ask them
8 of a case they may have followed and O. J. comes up quite
9 often, obviously, because it was saturated. And many people
10 feel that he actually got away with murder based on what
11 they saw from the media coverage and that sort of thing.
12 And I take it from what you learned, you thought that maybe
13 that was not the right decision made in that particular case
14 from what you know about it?

15 A. Well, of course, obviously, I didn't hear all
16 the evidence, but I had some concerns about the decision on
17 that one, yes.

18 Q. Okay. In Texas, the death penalty as it
19 exists today is reserved just for murder cases and then only
20 certain types of murder cases. It used to be more
21 expansive. But under our rules now it just qualifies in
22 certain types of murder cases with some aggravating facts.
23 And when we say murder cases, we're talking about
24 intentional killings, unjustified killings. It can't be
25 self-defense. It can't be an accident, that sort of thing.

1 The aggravating facts have to be
2 something like a murder that occurs during another felony.
3 Someone robs a store, a convenience store, shoots the clerk.
4 That can be a death penalty case. Breaking into someone's
5 home, murdering someone in the home, murder during a rape,
6 during a kidnapping or arson, also specific victims, such as
7 a police officer on duty, fireman on duty, prison guard on
8 duty, or a child under the age of six. Those types of
9 murders come under a death penalty option.

10 And then more than one victim for a
11 serial killer situation or a mass murder situation fall into
12 the death penalty statute as well as murder for hire, if
13 someone does it for money or profit. But those are the
14 specific situations which come under consideration.

15 From your personal point of view, does
16 that list make sense? Is that the kind of cases that you
17 feel should be considered?

18 A. Sounds like a pretty good list to me.

19 Q. Okay. Now, let me get into another area. Any
20 type of crime can have more than one individual involved,
21 same for capital murder. You may have several individuals
22 involved in the capital murder. And the law says that they
23 can all be held accountable. You, in fact, may have only
24 one person that actually causes the death and he may have
25 some accomplices. One person may have more active

1 involvement than others.

2 One example I give for that is
3 Mr. Wirskye and I, let's say, we decide we want to rob the
4 local bank down the street from us. Our plan calls for me
5 to go in with a loaded gun. He's going to help me. He's
6 going to carry a bag. I'm going to get everyone under
7 control and I'm going to pull the gun, threaten them, and
8 get their hands in the air, and then he's going to go in and
9 grab all the money from the bank drawers.

10 We do this, but during the course of this
11 robbery, I decide to intentionally kill someone. Maybe I
12 don't like the way one of the tellers looks at me. Maybe he
13 tells me they're going for an alarm, but I shoot them and we
14 run away, but we're caught soon afterwards.

15 Obviously, I could be prosecuted for
16 capital murder. I could receive the death penalty because I
17 caused the death. Mr. Wirskye could also be prosecuted for
18 capital murder. He could even receive the death penalty
19 under certain facts, if he's heavily involved and the jury
20 answers these questions in a certain way, as just an
21 accomplice.

22 People feel differently about that aspect
23 of the law as far as the accomplice goes. Some people tell
24 us they believe in the death penalty, but if it were up to
25 them, they would reserve it just for the triggerman and they

1 would kind of draw a line there. They, for an accomplice,
2 no, because they didn't cause the death, maybe a long term
3 of years in prison, but not the death penalty.

4 We have other jurors that tell us, no, I
5 think an accomplice can be held accountable for capital
6 murder and could even receive the death penalty. It's going
7 to depend on the facts and their involvement, but they feel
8 that is a just sentence in an accomplice situation,
9 depending on the facts.

10 Like I said, everyone has a different
11 viewpoint and we want to ask every juror their kind of gut
12 reaction to that, how they personally feel about the law of
13 accomplices being prosecuted for the death penalty. How do
14 you feel?

15 A. Well, he, if he goes in with you with intent
16 of robbing that place and he has, he doesn't know you are
17 going to shoot it, but he knows that could be a situation
18 that you might, then he's participated in that process. But
19 I guess I'd have to look at the individual situation whether
20 he, well, it's --

21 Q. Well, you kind of --

22 A. It's kind of a hard situation to answer
23 theoretically.

24 Q. Right.

25 A. You almost have to look at the specifics to --

1 Q. You kind of touched on it, I think, on your
2 own words. You said if he went in there, maybe he just
3 wanted to rob the place, but knew, you know, a gun was
4 involved and maybe he should have known something like that
5 would happen. In those situations do you feel that it's
6 fair to prosecute someone for capital murder, if they knew
7 something like that could happen?

8 A. Again, it's the individual specific
9 circumstances would have to be, you know, be considered
10 there. But certainly some situations he could be, in my
11 mind.

12 Q. Okay. Well, the law is this. It's kind of
13 two theories that you can go under. One is that you're
14 actively involved in the crime, you are assisting,
15 directing, aiding in some way, you can be found guilty as an
16 accomplice.

17 And the other is the law of conspiracy.
18 If we conspire to commit one crime, which is merely an
19 agreement to commit, in the example I gave, robbery, and one
20 of the conspirators, during the course of that, carrying out
21 that crime, commits another one to further it. And in this
22 case that would be murder, my part, shooting the teller.
23 Everyone in the conspiracy, the accomplices, can be found
24 guilty of that crime, if the jury believes they should have
25 anticipated something like that could occur.

1 A. Okay.

2 Q. Looking at all the facts. They don't even
3 have to have the intent that anyone die to be found guilty.
4 The jury just must believe from all the surrounding facts
5 that they should have anticipated a death could occur during
6 the course of that crime. And we can get a person guilty of
7 capital murder that way. To get them to the death penalty,
8 one of the questions we then have to step forward to is not
9 only should they have anticipated, but they did anticipate
10 that a life could be taken.

11 But the first part, the guilt stage, they
12 don't even have to have that intent to kill, it's just
13 should have. Again, it goes to the situation where the
14 accomplice is not the actual triggerman, but all the facts
15 show that he should have anticipated a life could occur.
16 And it's those situations in which we can get a guilty. And
17 under certain facts, even get a death penalty for an
18 accomplice.

19 And what I want to know from your own
20 personal point of view, do you think, do you agree with the
21 law in that you think it's fair that an accomplice can be
22 prosecuted in a capital murder situation and ultimately
23 receive the death penalty?

24 A. I think it could be fair if the situation is
25 right. Again, to what degree he should have been able to

1 anticipate that, I guess, in my mind, is what I'm trying to
2 sort out here, and it's --

3 Q. Right. How do you -- and that can be
4 troubling sometimes for jurors. How do you think you could
5 determine as a juror whether a person anticipated someone
6 might die?

7 A. Well, I certainly can't read his mind, so
8 you've got to base it on his actions and what he does. And
9 just in general, the circumstances of whether a normal
10 person should have been able to anticipate that, I guess --

11 Q. Okay. You kind of took the words right out of
12 my mouth. We can't open up his mind and show you his
13 intent, it's just a reasonable deduction from all his
14 actions preceding the crime, during the crime, and after the
15 crime itself.

16 A. Yes.

17 Q. And you feel, then, an accomplice, then,
18 could, it might be a just sentence for him to receive the
19 death penalty, even though he didn't cause the death,
20 depending on the facts again?

21 A. Could be, I guess, under the right
22 circumstances.

23 Q. Okay. And why do you think, you kind of told
24 us that the death penalty in general you think is a good law
25 because it stops that particular person from ever committing

1 a crime like that again. Do you think that's true with an
2 accomplice, also, the death penalty on an accomplice, the
3 same goal could be achieved that would prevent them from
4 helping commit these types of crimes?

5 A. It would certainly accomplish the goal of him
6 not being able to do it again, whether it's -- I mean, that
7 certainly deters it from happening again, yes.

8 Q. Okay. Are you familiar with the method of
9 execution in Texas?

10 A. In vague generalities, I know it's injection
11 with chemicals.

12 Q. Right. Lethal injection. And the procedures
13 are the same in each case. An execution is often covered in
14 the media, the newspapers. To get to the death penalty,
15 we'll go over these in a little more detail, the State has
16 to prove in the punishment stage that the defendant is a
17 continuing danger to society, that they did either intend
18 someone to die or that they anticipated that a life would be
19 taken and there's not sufficient mitigating evidence to
20 warrant a life sentence.

21 But a yes, yes, and a no equals a death
22 sentence. The jury doesn't write life or death in, but
23 that's what would occur, if the questions fall that way.
24 The Judge has no choice. He would sentence the defendant to
25 death. And if they're answered any other way, it would be a

1 life sentence. But those are the only two possible
2 outcomes, once a defendant has been found guilty of capital
3 murder.

4 A. Okay.

5 Q. The method of execution is the same, the
6 procedures are the same. They would be the same in this
7 case, if the defendant were found guilty and the questions
8 were answered yes, yes, and no.

9 He would be sentenced to death, placed on
10 death row, and, at some point in time down the line,
11 actually taken down to the downtown unit in Huntsville where
12 every execution takes place. He'd be put on a gurney. He
13 would be secured there by leather straps, needles placed in
14 his arm, and after given an opportunity for a last
15 statement, would have substances injected which would stop
16 his heart, shut down his lungs, cause him to die within
17 about ten to fifteen seconds.

18 Quite frankly, that's our goal in this
19 case. The State feels we have the type and quality of
20 evidence to convince a jury of this defendant's guilt and
21 that these questions should be answered in such a way that
22 would result in his execution. The defense takes the
23 opposite view.

24 You've told us from your personal point
25 of view that you do believe in the death penalty as a law.

1 It should be carried out. You've grown up, lived in Texas
2 most of your life or Oklahoma. You probably know, then,
3 that Texas leads the nation in executions.

4 A. Yes.

5 Q. That it is a state where the penalty is
6 actually carried out. So it's a very real thing. It's not
7 something we talk about philosophically. Now that you've
8 had more time to reflect upon participating in this type of
9 jury, this type of case, we just need to know this.

10 Do you feel that you're the type of
11 person who could actually participate and take pen in hand,
12 and, if we prove these issues to you, write in the verdict,
13 knowing that the defendant would be executed in the manner
14 that I described?

15 A. If the evidence, you know, if in my judgment
16 the evidence supports it, I could, yes.

17 Q. Okay. And I took the time to talk so much
18 about the accomplice and what we have to do is because we
19 can't get into the facts of the case, but I can tell you
20 that's the theory of law that the State is proceeding under,
21 that we're trying Mr. Murphy as an accomplice and seeking
22 the death penalty under that theory of law.

23 I think you've told me from your personal
24 point of view that you have no objection to the law, you
25 agree with the law, and it would just depend on the facts

1 and circumstances?

2 A. That's correct.

3 Q. Okay. Let's talk about these Special Issues
4 for a minute in a little more detail. You don't get to them
5 unless you have found a defendant guilty and then you might
6 hear additional evidence. At the close of that you get
7 these issues. And I'd like you just to review Special Issue
8 No. 1 by reading that to yourself very quickly and we'll go
9 over that.

10 A. (Prospective juror complies.) Okay.

11 Q. That question asks the jurors to make a
12 prediction about how the defendant would behave in the
13 future. Do you feel you could answer that question, make
14 that type of prediction, if you are given sufficient
15 evidence?

16 A. Yes.

17 Q. What types of information or facts would you
18 want to know about a person before you answered that
19 question?

20 A. Well, the facts surrounding the crime itself,
21 I guess, whether it would indicate that. I mean, if people
22 do certain things without regard to human life once, they
23 very well are going to do it again, you know. They could do
24 it again in the right circumstances, so --

25 Q. Okay. Certainly that's one of the areas that

1 you can consider, the facts you've already heard in the
2 guilt/innocence stage, you get to reconsider. You just have
3 to look at it from the point of view of this question and
4 not guilt. And one of the jurors told us the most important
5 factors they would look at, their role in the crime, the
6 brutality of the crime, that sort of thing, their actions
7 even after the crime.

8 You may, and if this type of evidence
9 exists, you can hear about a person's background, if they've
10 been in trouble with the law before. You can even hear from
11 those particular witnesses involved in prior crimes. You
12 can hear about their punishments they received, just the
13 general background. You can hear good things, you can hear
14 bad things, kind of a general "This is Your Life."

15 All that can go into consideration of
16 question No. 1, also. Do you feel that that type of
17 information would be valuable to you?

18 A. Pattern of behavior is certainly relevant,
19 yes.

20 Q. Okay. The language here in question No. 1,
21 you're not going to get legal definitions. You'll get
22 plenty of definitions in the first part of the trial. But
23 as far as these questions go, the Legislature and the courts
24 have not given us legal definitions. The definitions will
25 be the common usage that the jurors decide upon.

1 A. Okay.

2 Q. So I want to talk to you a little bit about
3 that. We have to prove that there's a probability that the
4 defendant would commit criminal acts of violence. When you
5 see "probability" in that sentence, what does that mean to
6 you?

7 A. That there's some likelihood that he would do
8 it again. I mean, based on, again, the evidence of the case
9 itself and his overall pattern of behavior.

10 Q. Okay. Just kind of his mindset and that sort
11 of thing, his, how he's conducted his life so far?

12 A. How he's conducted his life so far and if
13 there have been no major intervening event that has changed
14 his life which, you know, can happen, but doesn't happen too
15 often where somebody suddenly takes 180 degrees.

16 Q. Right. The only guidelines the courts have
17 given us is on one end, it's not a certainty. Probability
18 is not a certainty. We could never prove a certainty, I'm
19 sure. But it's more than a possibility, because anything
20 could be viewed as possible and then the question would
21 really have no meaning then. Courts often say more likely
22 than not, that sort of thing. Are you comfortable with that
23 type of language in the question?

24 A. Sure.

25 Q. Okay. We have to prove that the defendant

1 would commit criminal acts of violence. The words "criminal
2 acts of violence," what types of acts do you come to mind in
3 terms of that question?

4 A. Murder, any crime in which there's physical
5 violence, I guess, would certainly be.

6 Q. Any type of physical violence to other human
7 beings?

8 A. Sure.

9 Q. Threats, assaults, that sort of thing?

10 A. Um, well, if the threat is a serious threat,
11 yes.

12 Q. And finally we have to prove that he would
13 constitute a continuing threat to society. What does
14 "society" mean to you in terms of that?

15 A. That's me and you and everyone else, that's --

16 Q. Anyone and everyone he may come into contact
17 with?

18 A. Sure.

19 Q. And could it include people in the
20 penitentiary system, guards or inmates?

21 A. Yes.

22 Q. Police?

23 A. Yes.

24 Q. All right. The question, again, starts out
25 with a no answer. We have to prove to you it should be

1 answered yes. Again, we do that by you reviewing the
2 evidence in the guilt/innocence stage, once again, just from
3 the viewpoint of that question, and also the new information
4 you may have heard in the person's background.

5 And then if we prove it to you beyond a
6 reasonable doubt, you can answer it yes. If we don't, you'd
7 leave it as a no answer. Do you feel you could follow that
8 law, require the State to prove it to you beyond a
9 reasonable doubt?

10 A. I can follow that law.

11 Q. Okay. There's no, it's not an automatic yes
12 because you find someone guilty. There wouldn't be any
13 point to the question if the jury simply went back there and
14 said we found him guilty, let's write in a yes. The law
15 contemplates that the jury would wait, listen to the new
16 evidence, and then determine if the State has proven it. Do
17 you feel you can do that?

18 A. I can do it.

19 Q. Let me backtrack for one minute. I meant to
20 ask you this up front. We talk to every juror about this.
21 This case got a lot of publicity when it first occurred on
22 the TV and radio and newspaper. And you, like all jurors,
23 almost all jurors, that is, told us in the questionnaire
24 that you had heard it, followed some of it on TV, which
25 doesn't make a person ineligible to be a juror. But we just

1 have to explore that. What do you recall hearing or on TV
2 or seeing in the newspaper regarding the facts of the case?

3 A. Well, I guess the first thing I recall was I
4 don't remember exactly, I think I heard about a prison break
5 first on the news. And then the news, there were news
6 accounts of a robbery and a death of Officer Hawkins. And
7 then I think it tied it -- I don't recall exactly how, but
8 somehow, that was tied to the convicts who had escaped. And
9 ultimately they were tracked up to Colorado, I believe it
10 was.

11 Q. All right. Did you follow anything after
12 that, the subsequent court proceedings, that sort of thing?

13 A. Not that I recall anything specific, no.

14 Q. Okay. The bottom line is this. The fact that
15 you've read something, seen something in the media, doesn't
16 make you ineligible as a juror. However, if you sit on the
17 jury, you have to be able to assure the Court that you can
18 make your decisions just based on what you hear in the
19 courtroom from the witnesses, the evidence introduced. You
20 can't base it on what you've seen on TV or read in the
21 newspaper prior to this. You can't let that influence you.

22 We know very well we can't tell you to
23 forget about it, but you can't let that influence your
24 decision. It's just a common sense proposition, recognizing
25 that the most accurate information is not going to be from

1 the media. Oftentimes they don't get it correct. The more
2 accurate information will come from the actual witnesses
3 that come to court and testify. Do you feel you could
4 follow that rule of law?

5 A. I can follow that rule.

6 Q. Okay. Now, let's talk about Special Issue No.
7 2. It also starts out with a no answer and the State must
8 prove to you it should be answered yes. And if you'd just
9 take a moment to review that to yourself. That's the
10 question which involves that issue of the accomplice.

11 To get a person guilty, again, under that
12 conspiracy theory we only have to prove that they should
13 have anticipated that a life occur. And here we talk about
14 anticipation as they actually did anticipate. So there's a
15 difference there. It might be slight in a person's mind,
16 but there is a difference between should have and did
17 anticipate.

18 Now, it may be the same exact evidence.
19 Kind of like the guilt/innocence stage when you look at
20 Special Issue No. 1. And it may be the same exact evidence.
21 You just look at it from that different viewpoint of
22 question No. 2. And you can use any additional information
23 about the person's past which, if that would help you in
24 answering question No. 2, also. But it kind of covers all
25 situations.

1 The first part of the question asks if
2 the defendant actually caused the death. If you believe
3 they were the triggerman or the person that caused the death
4 from the evidence, then, obviously, that would answer that
5 part of the question. But the latter part talks about these
6 accomplice situations. If they didn't actually cause the
7 death, but you believe from the evidence that they intended
8 to kill the deceased or another person, or they anticipated
9 that a human life would be taken, then you would answer it
10 yes.

11 And, again, we can't open the defendant's
12 mind up. You can't read his mind. But a jury can use their
13 common sense and make reasonable deductions from the
14 evidence from their actions, their role in the crime, how
15 the crime was carried out, from their actions after the
16 crime, which can aid you in determining their intent. Do
17 you feel comfortable in answering a question like that with
18 that type of evidence?

19 A. If I have the evidence I could, yes, I feel
20 comfortable.

21 Q. Okay. Again, just because you found someone
22 guilty, just because you found they're a continuing danger
23 to society, it doesn't mean that's an automatic yes. You
24 have to look at the questions separately, analyze the
25 evidence from the point of view of that question, and then

1 answer it, and require the State to prove it to you beyond a
2 reasonable doubt. Do you feel you could do that?

3 A. Yes.

4 Q. Okay. And this last question is the
5 mitigation question. It's a little different in that
6 neither side has the burden of proof. We don't have to
7 prove it should be answered no. The defense doesn't have to
8 prove that it should be answered yes. It's just the jurors
9 have to look at all the evidence and background and
10 determine if they think there's sufficient mitigating
11 evidence.

12 It's kind of the catchall. It allows the
13 juries to show mercy in a case, if they believe that's the
14 right thing to do based on what they see in the evidence and
15 based in their heart. You don't get to the question unless
16 you have found someone guilty of capital murder, unless you
17 think they are a continuing danger, and you feel that they
18 anticipated that a life would be taken.

19 But there might be some facts in their
20 background, the way they -- something in the background of
21 the crime that would tell you a life sentence is the right
22 thing to do. What mitigating evidence is, you don't have to
23 tell us. You're not required under law to think of an
24 example or tell us what it is. You just have to be able to
25 assure the Court that you can keep your mind open to it.

1 And if you think there's sufficient mitigating evidence, you
2 could answer it yes. If you don't think there is sufficient
3 mitigating evidence, you could answer it no. Do you feel
4 you could do that?

5 A. I can do it.

6 Q. Okay. Now, I told you, you don't have to
7 think of anything that is mitigating, but I always like to
8 ask you to kind of get your gut reaction. As you sit there
9 today, does anything come to mind that you might view as
10 potentially mitigating evidence?

11 A. Top of my head, I really can't think of
12 anything, no.

13 Q. Okay. Good. You're like most of the jurors,
14 then. Kind of scares us when someone can. We don't
15 anticipate that you sit around thinking about these things.
16 But we have talked to jurors about different areas. We go
17 into the questionnaire on an area of a person's background.

18 Oftentimes you hear about a person's
19 background in a capital murder case. Sometimes they come
20 from a poor background. Sometimes they come from a broken
21 home. They may have been physically abused as a child.
22 Maybe they were mentally abused, maybe both. Could have had
23 just a bad childhood.

24 Some people view that as potentially
25 mitigating, especially if it's severe, something they'd

1 consider in the question. Other jurors tell us, I'd feel
2 bad for them, sympathy, but I know people or I've seen
3 people that come from a bad background and they don't commit
4 capital murders. If you're an adult, then you should be
5 held accountable.

6 People kind of feel differently about
7 that. Do you have any views about a person's background, a
8 bad background, that sort of thing?

9 A. Well, I think everyone is responsible for
10 their own choices, period. I mean, some, certainly
11 background can, your background can take you one way or the
12 other, but ultimately you have a choice to either do
13 something or not do something, and we as humans have that
14 choice.

15 Q. A lot of people tell us that. And mitigation
16 can be anything. Some people view it as young age, some
17 old. A lot of times people tell us mental capacity.
18 Obviously, a person has to know right from wrong to be
19 prosecuted. But some are slower than others. There may be
20 some mental defect. It's not really their fault and they
21 could look at that area.

22 But, really, you're not, and again, you
23 don't have to tell us what it would be, just that you can
24 keep your mind open to it, see value in that question, and
25 if you think or you see sufficient evidence that's

1 mitigating, you would answer it that way. And if you don't,
2 you could answer it no. Kind of just let the chips fall
3 where they may. You feel you could do that?

4 A. I believe I can.

5 Q. Okay. Let's talk a little bit about some
6 rules that apply to each case. You'll probably be familiar
7 with most of these rules because they apply to every
8 criminal case. They came into play in the last jury you sat
9 on and they're going to be things you kind of grew up with
10 in school.

11 The presumption of innocence, every
12 defendant starts out with the presumption of innocence. The
13 fact that he's been arrested, charged, indicted, or that
14 we're even going through this process, is no evidence of his
15 guilt. The State has to prove his guilt by putting on
16 witnesses and overcoming that presumption.

17 But as we start, all jurors must give the
18 defendant that presumption of innocence and require us to
19 prove the case beyond a reasonable doubt. Do you feel you
20 could do that?

21 A. I can do that.

22 Q. The burden of proof is on the State of Texas
23 and it never leaves. It never shifts to the defense. It
24 always stays at this table. You might anticipate or believe
25 through common sense that the defense may put on witnesses

1 or ask questions or make arguments. But legally under law
2 they have no obligation to. I'm sure they will. They're
3 good lawyers. But the law says that you can't shift the
4 burden to them. They don't have to prove his innocence.
5 The burden stays right here on the State of Texas. Could
6 you follow that rule of law?

7 A. I can follow that rule.

8 Q. Okay. You probably, I'm sure, have heard of
9 the Fifth Amendment. Every person charged with a crime, if
10 they choose to testify, they can. No one can stop them.
11 And then you would judge them like any other witness. But
12 if they choose not to testify, the Court would instruct you
13 that you cannot hold that against them. The fact that they
14 didn't want to testify, can't be used as evidence in any
15 way. You can only make your decision based on the witnesses
16 that you heard.

17 There could be numerous reasons why
18 someone may not testify. They may be poorly educated. They
19 may be very, might not speak well in front of other people,
20 too nervous, they might look guilty when they're not. They
21 may not do well against a lawyer. They could be very guilty
22 and look bad. They could be following just the advice of
23 their lawyer that tells them not to testify. They kind of
24 take care of that by just explaining to the jury and
25 instructing them for the Court's charge that you can't hold

1 that against them. Do you feel you could do that?

2 A. I can do that.

3 Q. Okay. Jurors tell us, hey, I want to hear
4 from him, I want to hear everything about the case. But you
5 can't hold it against him, if he chooses not to.

6 The burden of proof from the State of
7 Texas goes to each and every element of the offense. And
8 what I mean by that element is each part of the indictment,
9 and if we fail on just one element, you're obligated under
10 law to find the defendant not guilty.

11 Let me give you an example. We have to
12 prove who committed the crime. If you had a reasonable
13 doubt at the close of the evidence about who committed the
14 crime, then obviously you're going to find him not guilty.
15 But that goes to even the county. We have to prove this
16 happened in Dallas County. Perhaps the evidence may show
17 that this may have actually happened in Tarrant County, it
18 was over in Grand Prairie or something.

19 And I don't anticipate something like
20 that would happen, but just to kind of use it as an example.
21 That would show very poor preparation, no doubt, on the
22 prosecution's point of view, if you believe the evidence
23 really showed it happened in Tarrant County.

24 But that would be a reasonable doubt and
25 under the law that's just as important as the defendant's

1 identity. As a juror you can't help us out and kind of give
2 us that one or say it's a technicality. You have to adhere
3 to the law and would have to find the defendant not guilty.
4 You probably wouldn't like it. You would go upstairs and
5 have us fired, I'm sure. But you can't go on the State's
6 side and give us one of the elements just because you feel
7 bad for us or anything like that.

8 Again, I don't anticipate that to happen,
9 but that's an example we give to demonstrate how that burden
10 of proof goes to each and every element of the offense. Do
11 you feel you could follow that rule of law and require us to
12 prove each and every element?

13 A. Yes.

14 Q. Okay. Police officers testify in criminal
15 cases. That's kind of common sense. People respect the job
16 police officers do, but you can't start them out ahead of
17 other witnesses. They have to, you know, there's good
18 police officers and there are bad police officers. You have
19 to judge them like anyone else and once they hit the witness
20 stand, you judge their credibility. If you feel they're a
21 good witness, then you judge them accordingly. If you feel
22 they're bad, you judge them that way.

23 But you can't automatically start them
24 out ahead. You have to start them out like you would any
25 other witness. Do you feel you could follow that rule of

1 law?

2 A. Yes.

3 Q. Okay. Sometimes jurors find defendants guilty
4 of lesser included offenses. Lesser included offense of
5 capital murder is aggravated robbery. That penalty range
6 goes from life all the way down to five years in prison and
7 anywhere in between.

8 The law simply requires the jurors to
9 keep their mind open to that full range of punishment, and
10 if you think, after all the background evidence is in and
11 their role in the crime, that a life sentence should be
12 imposed, you could do that. If you think as little as five
13 years in prison should be imposed, you could do that, or
14 anywhere in between. Do you feel you can keep your mind
15 open to that full range of punishment?

16 A. Yes.

17 Q. Parole laws sometimes come up in the news, the
18 media. The Judge would instruct you in a capital murder
19 case that a capital life sentence equals forty calendar
20 years before a person can become eligible for parole. But
21 he would also instruct you that you can't consider our
22 parole laws in any way in your deliberations. You must
23 simply consider a life sentence a life sentence. Do you
24 feel you could follow that rule?

25 A. I can follow it. It's hard to take that out

1 of your mind, I mean, and totally dismiss that when you know
2 it.

3 Q. And the Court will even instruct you what the
4 parole law is. The reason the courts don't want the jurors
5 to deliberate is the Court has no control over the parole
6 laws. The jurors have no control over it. It's something
7 that may change. It's something that no one has a decision.
8 He can just simply tell you that it's forty calendar years
9 and then that's when they become eligible, not necessarily
10 that they would be paroled.

11 So the jurors simply, when they look at
12 the life sentence, consider that as a life sentence and
13 can't enter that into the deliberations. Might cause --
14 someone else makes those decisions. They don't want jurors
15 to make determinations based on what someone else may do.
16 Could you follow that rule of law?

17 A. I could follow it.

18 Q. One other area I want to go over in these
19 Special Issues. Sometimes you hear from experts like
20 psychologists and psychiatrists from one side or the other.
21 Sometimes the defense calls them. Sometimes the prosecution
22 calls them. They can render opinions about a future
23 dangerousness. They can talk to you about mitigation, how
24 they feel or why they feel a person reacts the way they do.

25 Some jurors put a lot of faith in those

1 type of experts. They really think they have a lot of
2 value. We have other jurors that really don't put any faith
3 at all in those. I've heard them called the soft sciences.
4 They feel you can, if you look hard enough, you will find
5 one to come up with any theory.

6 And then we have other jurors that say, I
7 can look at it like I would any other piece of evidence.
8 It's not going to -- from the beginning I'm not going to
9 give it any greater weight, but I'll look at it as another
10 piece of the pie. How do you feel about that type of
11 expert?

12 A. Well, I think there's a lot of, in almost all
13 cases in my observation, if one side puts an expert on, the
14 other side is going to put an expert on that says exactly
15 the opposite. So you've got to use your judgment, I guess,
16 as to the credibility and who do you believe.

17 Q. Just make your judgment once they testify and
18 then judge their credibility?

19 A. Judge their credibility based on what you
20 hear, and if it makes sense to you as a juror.

21 Q. Okay. Well, I've covered a lot of areas, and
22 I think I'm just about finished. Do you have any questions
23 over anything we've gone over?

24 A. I don't believe so.

25 Q. All right. Well, I appreciate your

1 cooperation and I appreciate your patience.

2 MR. SHOOK: That's all the questions I
3 have, Judge.

4 THE COURT: Mr. Thomas, can we get you
5 anything? You're about halfway through.

6 PROSPECTIVE JUROR: I'm fine, sir, thank
7 you.

8 THE COURT: Ms. Busbee?

9 MS. BUSBEE: Thank you, Your Honor.

10 CROSS-EXAMINATION

11 BY MS. BUSBEE:

12 Q. Mr. Thomas, I'm not going to take as long as
13 Mr. Shook did because he had the job of explaining
14 everything to you. I notice that you're a mathematician by
15 education and like a lot of mathematicians you appreciate a
16 formula. And in some respects this is a formula, so I'd
17 like to talk to you a little bit about that.

18 But before I even start in on that, do
19 you have any comments on the law as it's been explained to
20 you, things that, you know, you like or things that wouldn't
21 be in it, if you were writing it? How do you feel about it?

22 A. I wouldn't presume to tell them how to write
23 the law.

24 Q. Okay, good. Well, you know, some parts of
25 this are precise and some parts are imprecise. And I'm

1 satisfied that you understand our statutory scheme here. I
2 notice on page 9 of your questionnaire, the very last
3 question, it talks about whether or not regardless of what a
4 Judge says the law is, the jurors should do what they
5 believe is the right thing. I don't really find this a
6 really instructive question, but at least it's a place to
7 start the discussion.

8 If any of the things that you would be
9 asked to do as a juror here would violate your conscience, I
10 get the impression here that you would go with what you felt
11 was the right thing to do?

12 A. Well, I believe in the law. I believe in
13 following the law. I can't really envision any circumstance
14 where I would -- I forgot how I answered that, to tell you
15 the truth. But, I guess I would consider that if I felt
16 some grave injustice was being done. But the odds are
17 pretty long against that, I guess.

18 Q. Well, and the reason I'm leading up to this,
19 there's no other type of jury selection in the world like
20 this jury selection because a life has been taken,
21 obviously, and a life may be taken. And so, these are
22 things that are kind of outside what we would ordinarily
23 expect a citizen to do.

24 And that's why we ask you these
25 questions, because lots of people, even though technically

1 would be eligible for jury duty, they tell us that they are
2 simply uncomfortable in these situations once they
3 understand what the law is.

4 Some people have said or expressed some
5 reservations about the death penalty for someone who's a
6 party. Other people have, you know, had other problems with
7 the law. We're just giving you an opportunity at this point
8 to tell us if there are things here that you feel
9 uncomfortable with, because as you saw, we had a lot of
10 folks and we have a lot of folks left to talk to.

11 And if there was anything about this
12 scheme that you felt might cause you to have to make a
13 decision that you weren't comfortable with in your
14 conscience, you can just tell us. It doesn't, of course,
15 make you a bad person. It just makes you someone who has a
16 different set of values than what this scheme contemplates.

17 A. Well, I feel like I can, could do it. I'll
18 just flat tell you that whatever my decision would be, if I
19 were in that circumstance, would be consistent with what my
20 conscience tells me.

21 Q. Sure, sure.

22 A. So --

23 Q. And as long as you're telling us that your
24 decisions on these issues would be based on finding them
25 beyond a reasonable doubt, based on what the State has

1 proven, then that's fine with us, too. That's fine with us,
2 too.

3 Here's a question that I thought of that
4 might in particular be interesting to ask you because you
5 pointed out that, you know, this question, the expert
6 witnesses, and as I think Mr. Shook called them the soft
7 sciences. The way we have this scheme for punishment,
8 having found a person guilty of the offense of capital
9 murder, you'd have to find Special Issue No. 1 true or yes
10 beyond a reasonable doubt, and 2, yes, beyond a reasonable
11 doubt.

12 But then we get down to this Special
13 Issue No. 3, which has no real burden of proof or has no
14 real, you know, numbers to punch in or any definite standard
15 that has to be established by either side. I call it a
16 touchy/feely question. It's also been called a safety
17 valve.

18 My question is, having decided that
19 someone answered yes to the first two Special Issues, do you
20 see any value in having a question that, despite all of
21 that, do you think that the person should be given the death
22 penalty?

23 A. Any value in considering Special Issue 3?

24 Q. Yes, sir.

25 A. I see value, yes, in doing it. Now, whether

1 that would override the first two, you know, again, it's
2 you're going to have to look at, make judgment calls here.

3 Q. Well, and, you know, and believe me, we could
4 have talked to one juror a week if we went into all the fact
5 situations and, of course, the law won't let us. Are you
6 the sort of person who would consider answering that
7 question yes, if you heard that evidence? Or would your
8 mind be closed to a life sentence?

9 A. I don't think my mind is closed to anything at
10 this point, but --

11 Q. So not having heard it and which I realize
12 that this is a dumb question to most people because it is
13 actually a dumb question, but it's the way it has to be
14 asked. Having -- without knowing what that might be, you
15 could give someone a life sentence, if you heard something
16 that made you think they should not be put to death, despite
17 the fact that you'd answered these other questions in a way
18 that would put them to death?

19 A. It's conceivable that I could. Again,
20 probability is probably pretty narrow here, but I won't rule
21 it out completely.

22 Q. Right. And I appreciate that. That makes you
23 qualified. Let me see if there's anything else on my list.
24 You know, I didn't, I'm sure Mr. Shook asked you this, but I
25 didn't cross it off my list yet, so let me just reiterate

1 it. And if he hasn't, that's fine, too. Based on what you
2 know about this case, have you formed any opinions about it
3 or what should happen in this case?

4 A. This particular case?

5 Q. Yes, sir.

6 A. No.

7 MS. BUSBEE: Those are all the questions
8 I have of this juror, Your Honor.

9 THE COURT: Sir, if you would be so kind
10 as to wait for us outside and we'll have you back in just a
11 few minutes.

12 [Prospective juror out]

13 THE COURT: What says the State regarding
14 juror No. 2330, Mr. Walter W. Thomas?

15 MR. SHOOK: We have no challenges for
16 cause.

17 THE COURT: What says the defense?

18 MS. BUSBEE: No challenge for cause, Your
19 Honor.

20 THE COURT: Step in your office?

21 MS. BUSBEE: I'm ready.

22 MR. SHOOK: We'll accept the juror.

23 MS. BUSBEE: We'll exercise a preemptory
24 challenge on this juror.

25 THE COURT: Ask Mr. Thomas to come back

1 in, please.

2 [Prospective juror in]

3 THE COURT: Mr. Thomas, thank you so much
4 for coming in today. It's a pleasure to have someone with
5 such thoughtful reflections in discussing these issues. I'm
6 just going to inform you, sir, that you are not going to be
7 on this jury. Thank you, sir.

8 [Prospective juror out]

9 (Recess)

10 THE COURT: Ask Mr. Versteeg to come in.

11 [Prospective juror in]

12 THE COURT: Good afternoon, sir.

13 PROSPECTIVE JUROR: Hi.

14 THE COURT: Please have a seat. Juror
15 No. 2364, Bradley J. Versteeg. Welcome to the 283rd. Sorry
16 to get you in here at 3:46 in the afternoon. I take them as
17 they come. We have three people in the morning and three in
18 the afternoon and whoever is here first goes first. That's
19 just the way it is.

20 PROSPECTIVE JUROR: That's fine.

21 THE COURT: Obviously, you've had plenty
22 of time to read, hopefully more than once, the guide I
23 provided for you?

24 PROSPECTIVE JUROR: Yes, sir.

25 THE COURT: I also gave you a copy of the

1 questionnaire that you filled out in May to help you again
2 think about the issues we're going to be discussing to
3 refresh your memory as to the answers you provided. And the
4 objective here is we don't expect you to understand all the
5 law at this point, but the lawyers are going to visit with
6 you to help you understand the law, how it relates to this
7 process.

8 Two questions I'll have at the end of the
9 interview session will be, number one, do you understand the
10 law? Number two, can you follow the law? That's the big
11 picture I have. Only question I have for you at this time,
12 sir, will you be able to serve this Court for a period of
13 two weeks beginning on November 10th?

14 PROSPECTIVE JUROR: Yes.

15 THE COURT: Thank you. Mr. Wirskeye?

16 MR. WIRSKYE: May it please the Court?

17 BRADLEY VERSTEEG,

18 having been duly sworn, was examined and testified as
19 follows:

20 DIRECT EXAMINATION

21 BY MR. WIRSKYE:

22 Q. Mr. Versteeg, how are you this afternoon?

23 A. Great, thank you.

24 Q. My name is Bill Wirskeye and I'll be the
25 Assistant DA that will be visiting with you for the next few

1 minutes. Thanks for waiting as the afternoon has dragged
2 on. I couldn't help but notice you hesitated a little bit
3 in answering the Judge. And I know by looking at your
4 questionnaire, you may have some issues with your job.
5 Looks like it's kind of a two-person shop; is that right?

6 A. That's correct.

7 Q. Okay. Tell us what you do for a living.

8 A. Less than a year ago we started a restaurant
9 supply company and there's two of us, my wife and myself.
10 And on a daily basis we take sales orders. I pick up
11 supplies and deliver supplies to our customers as well as
12 running a 24-hour, 7-day-a-week emergency ice service. So
13 that's what we're currently doing.

14 A. You're on call 24/7?

15 A. Yes.

16 Q. And it's kind of a new start-up business?

17 A. Yes, it is.

18 Q. What type of impact -- obviously, the Judge
19 can't let you go for legal reasons, everybody that has a job
20 excuse. But the lawyers like to know kind of what impact or
21 what effect it may have, because, you know, we don't want a
22 juror over there that's worried about what's going on, you
23 know, back at the shop.

24 What type of impact do you think it would
25 have on you, if you had to come down here for two weeks and

1 be a juror?

2 A. Well, there would be a financial impact, but
3 there would also be -- I would have to close the door at
4 times to be here.

5 Q. Okay.

6 A. Of my business.

7 Q. You know, legally the Judge can't let you go,
8 because it would be a financial hardship. The one
9 qualification to that is sometimes we have people that have
10 so many things going on in their personal life, whatever it
11 is, somebody ill or job, school, whatever, and sometimes
12 those people tell us, you know, in all honesty in my heart
13 of hearts I just could not really concentrate on what was
14 going on in the courtroom because I might be too worried
15 about what's going on back in my personal life, professional
16 life, outside the courtroom.

17 Is your situation something that you
18 think might affect you in that way or what do you think?

19 A. I really couldn't tell you, unless I was in
20 that situation.

21 Q. Okay. Do you have concerns as you sit there
22 now that that could possibly come up?

23 A. I do have some concerns, yes, sir.

24 Q. I guess the 24-hour hotline went off or the
25 pager?

1 THE COURT: You're not going to be
2 worried about ice in November, are you?

3 PROSPECTIVE JUROR: Yes. December.
4 Malls are extremely busy and their machines can't keep up.

5 THE COURT: In December?

6 PROSPECTIVE JUROR: In December, yes,
7 sir, the shoppers for Christmas. I've already been
8 forewarned by a couple of companies that have slowed down
9 now to be ready for them in December.

10 Q. (By Mr. Wirsky) While you were talking to
11 the Judge, I had a chance to visit with Ms. Busbee, the
12 other lawyer, and before I give you some good news, I do
13 want to emphasize this. You had some comments on
14 prosecutors that said there were too many money hungry to
15 sue for any reason. I think you may be confusing us with
16 claims lawyers who chase ambulances, I'm not sure.

17 We make a decent living. We don't make a
18 whole lot of money. I drive an old truck. We don't
19 actually sue people. We just -- the crimes that come to us.
20 But anyway, the next time you -- that thought slips into
21 your mind about lawyers, just remember that these two,
22 defense lawyer and prosecutor, agreed to let you go. How is
23 that?

24 A. Well, I appreciate that.

25 Q. Okay. Thank you, sir.

1 MR. WIRSKYE: That's all I have, Judge.
2 We have an agreement.

3 THE COURT: Mr. Versteeg, you can tell I
4 don't spend much time on -- either you are or you're not.
5 I'm not going to let you off. But the lawyers have agreed
6 to. They are -- I have a very strict standard and either
7 you fit or you don't and I just call it the way it is. They
8 have excused you, so you don't have to worry about your
9 business and you are free to go. Thank you, sir.

10 PROSPECTIVE JUROR: Okay. Thank you.

11 [Prospective juror out]

12 [End of Volume]
13
14
15
16
17
18
19
20
21
22
23
24
25

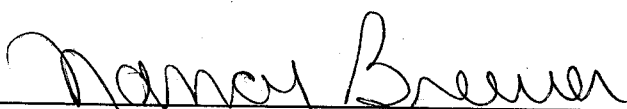
1 STATE OF TEXAS *

2 COUNTY OF DALLAS *

3 I, NANCY BREWER, Official Court Reporter for the 283rd
4 Judicial District Court, do hereby certify that the above
5 and foregoing constitutes a true and correct transcription
6 of all portions of evidence and other proceedings requested
7 in writing by counsel for the parties to be included in this
8 volume of the Reporter's Record, in the above-styled and
9 numbered cause, all of which occurred in open court or in
10 chambers and were reported by me.

11 WITNESS MY OFFICIAL HAND on this the 4 day of

12 March, 2004.

13
14
15 
16 NANCY BREWER, CSR, NO. 5759
17 Expiration Date: 12-31-04
18 Official Reporter, 283rd JDC
19 Frank Crowley Crts. Bldg. LB33
20 133 No. Industrial Blvd.
21 Dallas, TX 75207
22 (214) 653-5863
23
24
25

74851

REPORTER'S RECORD

VOLUME 23 OF 61 VOLUMES

TRIAL COURT CAUSE NO. F01-00328-T

STATE OF TEXAS * IN THE DISTRICT COURT
VS. * DALLAS COUNTY, TEXAS
PATRICK HENRY MURPHY, JR. * 283RD DISTRICT COURT

INDIVIDUAL VOIR DIRE

FILED IN
COURT OF CRIMINAL APPEALS

MAR 9 - 2004

Troy C. Bennett, Jr., Clerk

On the 26th day of September 2003, the following
proceedings came on to be heard in the above-entitled and
numbered cause before the Honorable Vickers L. Cunningham,
Sr., Judge Presiding, held in Dallas, Dallas County, Texas.

Proceedings reported by machine shorthand.

ORIGINAL

A P P E A R A N C E S

APPEARING FOR THE STATE

Mr. Toby Shook
SBOT NO. 18293250
And
Mr. Bill Wirskye
SBOT NO. 00788696
Assistant District Attorneys
133 No. Industrial Blvd.
Dallas, Texas 75207
Phone: 214/653-3600

APPEARING FOR THE DEFENDANT

Ms. Brook Busbee
Attorney at Law
SBOT: 03488000
703 McKinney Ave. Ste. 312
Dallas, TX 75202
214/754-9090

Mr. Juan Sanchez
Attorney at Law
SBOT: 00791599
5630 Yale Blvd.
Dallas, TX 75206
214/365-0700

PROSPECTIVE JUROR INDEX

<u>PROSPECTIVE JUROR</u>	<u>CRT.</u>	<u>STATE</u>	<u>DEFENSE</u>	<u>VOL.</u>
Cathryn Mitchell	4	5	43	23
Diane Courtney	54	55		23
Michael Smith	92	93	122	23

P R O C E E D I N G S

THE COURT: Cathryn Mitchell.

[Prospective juror in]

THE COURT: Good morning.

PROSPECTIVE JUROR: Good morning.

THE COURT: Welcome to the 283rd. I appreciate you being here early and on time. We like to put three people up in the morning and the first one here gets to go first, and we appreciate you being here. We've got juror No. 2426, Ms. Cathryn Lynn Mitchell; is that correct?

PROSPECTIVE JUROR: Yes.

THE COURT: Ms. Mitchell, have you had an opportunity this morning to review the guide I provided for you?

PROSPECTIVE JUROR: I have.

THE COURT: And also a copy of your questionnaire that you filled out for us back in May?

PROSPECTIVE JUROR: Yes.

THE COURT: Please don't think that you've got to understand all the law.

PROSPECTIVE JUROR: Good.

THE COURT: I give you a lot of law the first thing in the morning and this is the process by which the attorneys are going to explain this to you and for you to have an opportunity to figure out how it all relates and

1 ask questions and understand the law. At the end of the
2 process I have two questions I must answer. Number one is
3 do you understand the law? Number two, can you follow the
4 law? That's my big picture here.

5 There are no wrong answers. And many
6 people come in and are somewhat intimidated. You walk in
7 and you are the only one. You can hide within 700 people
8 downstairs. Here you're the focus of attention. We're
9 sorry if you feel that way. It's the only way we can do it.
10 And it's as informal as we can get. But there are no wrong
11 answers, so don't worry about that, just honest answers.

12 The only question that I have for you at
13 this time is will you be able to serve this Court for a
14 period of two weeks beginning November 10th?

15 PROSPECTIVE JUROR: I will.

16 THE COURT: Thank you very much.

17 Mr. Wirskye?

18 MR. WIRSKYE: May it please the Court?

19 CATHRYN MITCHELL,

20 having been duly sworn, was examined and testified as
21 follows:

22 DIRECT EXAMINATION

23 BY MR. WIRSKYE:

24 Q. Ms. Mitchell, how are you this morning?

25 A. I'm good, thank you.

1 Q. Kind of feel like you're on trial?

2 A. Yeah, I've never been in this place before.

3 Q. As the Judge said, because this is a death
4 penalty case, we do this individually and we kind of figured
5 out the best place to put a juror is up on the witness
6 stand, but we know it's a little intimidating.

7 My name is Bill Wirskey and I'll be the
8 assistant DA that will be visiting with you for the next few
9 minutes. What I'd like to do is follow up on some of the
10 information on your questionnaire that you were kind enough
11 to give us in that lengthy questionnaire, talk to you a
12 little bit about your thoughts and feelings about the death
13 penalty, and then follow up with some of the rules and some
14 of the laws that apply in death penalty cases and make sure
15 you understand it.

16 What did you think when you got the call
17 to come back for an individual interview on a death penalty
18 case?

19 A. Well, when I asked the guy, I said now, how
20 many got called back? And he told me. And I said, so
21 you're telling me that a thousand people didn't get this
22 call? And I was like, so it was -- it was -- it was just
23 interesting.

24 Q. What we do, just to let you know, everybody
25 that was down with your group and then we had another group

1 in the afternoon, fills out questionnaires. The lawyers get
2 together and read them and we kind of figure out who we
3 think might be the best jurors, who could be fair to both
4 sides. And then we bring those people down, those select
5 few, for the individual interview. So, in a sense you've
6 already made one cut. So, are you nervous at all because
7 this is a case involving the death penalty?

8 A. No, not because of that.

9 Q. Okay. Is there another reason?

10 A. Just, just the responsibility of serving on
11 any kind of a jury, and so just that, that if chosen, that I
12 would have the wisdom and the discernment to understand and
13 take in everything that is being presented.

14 Q. Okay. Looks like you were on a jury not too
15 long ago; is that right?

16 A. Yes.

17 Q. Driving while intoxicated case?

18 A. Correct.

19 Q. Okay. How did that go? What are your
20 impressions of that experience?

21 A. Um, in what manner? You mean, like what the
22 verdict was or --

23 Q. Was the evidence pretty straightforward or --

24 A. I felt it was, yes.

25 Q. Okay. It looks like in your questionnaire the

1 person was found guilty?

2 A. Correct.

3 Q. How did the deliberations go? Were they kind
4 of smooth or long and drawn out?

5 A. They were pretty drawn out. You know, I felt
6 that it would probably be a pretty quick thing and it
7 lasted, I think, three days.

8 Q. Really?

9 A. And most of that time was in deliberations.

10 Q. Okay. Did it ever get heated back there?

11 A. A little bit.

12 Q. Okay. I notice we asked you to kind of rank
13 yourself whether you participated more or less than other
14 jurors and you said, well, probably about equally, but you
15 thought you may have had more influence?

16 A. I felt that he was guilty and there were
17 several that couldn't, couldn't come to that point. And so
18 we deliberated quite a bit and came back and, you know, I
19 had given my reasons and there were other people who had
20 given their reasons and -- but I just felt that what we had
21 seen and what we had heard went that direction. And so, I
22 think that had I said, yeah, I'll go along with you, he's
23 not guilty, that's fine, that it would have ended much
24 sooner.

25 And so, you have that incredible sense of

1 responsibility. And so when they brought us back in and
2 afterwards the Judge went through and shared with us the
3 rest of the story, I was like, oh, thank you.

4 Q. Okay. Y'all found out something else from the
5 Judge?

6 A. Exactly.

7 Q. What did you find out?

8 A. That there had been many prior convictions as
9 well and, you know, that, you know, I mean, and he was
10 really good. He said, know that you've done the right
11 thing. And so, I just was like, oh.

12 Q. Were there six people on your jury or twelve,
13 do you remember? Felony or misdemeanor case?

14 A. Um, there were twelve.

15 Q. Twelve? So it was a felony case, as far as
16 you remember?

17 A. Yeah, I'm sorry.

18 Q. That's okay. I know most people try to put
19 jury service out of their minds as soon as they leave the
20 courthouse. And you work for Advocare International?

21 A. Correct.

22 Q. Is that right?

23 A. Uh-huh.

24 Q. What type of business is that?

25 A. Nutritional supplements.

1 Q. Okay. And what do you do kind of on a day-in
2 and day-out basis?

3 A. I'm like an administrative assistant to the
4 director of distribution.

5 Q. Okay. And before that, looks like you were in
6 the travel industry for a while?

7 A. Yes.

8 A. Okay. Hopefully your prior jury service
9 experience will give you a leg up in a sense in this. Some
10 of the things we'll talk about, hopefully will be familiar,
11 that apply to any criminal case, whether it's a DWI or a
12 capital murder. But -- and you told us you generally agree
13 with the death penalty; is that right?

14 A. Correct.

15 Q. Could you tell us why you hold that opinion or
16 what purpose do you think it serves to have that death
17 penalty option available?

18 A. Um, I feel that in circumstances where it's a
19 capital offense as defined, you know, and I have never read
20 this before that talked, you know, that determines what is a
21 capital offense.

22 Q. Most people have no idea exactly what a
23 capital offense is.

24 A. Yeah. And so, when I read it and I went,
25 well, yeah, that makes sense. But where it's a crime that

1 is senseless, you know, where it is -- it's not just an act
2 of rage, but it is --it is against another individual with
3 malice, you know, intended. That -- that that is the --
4 that is the ultimate judgment that that person can receive.
5 And rather than them just sitting in a jail cell for the
6 next 50 years, I don't see the purpose.

7 Q. Okay. Is this kind of an opinion you have
8 held most of your adult life?

9 A. Yes.

10 Q. Or is it a conclusion you have come to, or is
11 it based kind of, I guess, on religious, moral, ethical
12 grounds, or that type thing?

13 A. Probably.

14 Q. Okay. And, as I said, most people have
15 absolutely no idea what technically constitutes a capital
16 murder.

17 A. Right.

18 Q. In Texas, capital murder or the death penalty
19 is limited only to murder cases and then only a certain
20 group or certain type of murder cases. If you murder a
21 certain type of person, a police officer, fireman, prison
22 guard on duty, or if you commit an intentional murder in the
23 course of committing another felony, like robbery, burglary,
24 rape, that type thing, mass murders, serial murders, murder
25 for hire, those type scenarios. It's just what we reserve

1 the death penalty for in Texas.

2 Looking at your questionnaire, I know you
3 didn't know the law before you walked in here, but it looks
4 like if it were up to you, and a lot of people feel this
5 way, they might expand the available groups of crimes. I
6 know, I noticed you mentioned rape as a potential crime and
7 I guess in your view could call for the death penalty; is
8 that right?

9 A. Right.

10 Q. Okay. If you were kind of Governor for the
11 day, you may, you know, a lot of people say they'd make it
12 apply to all murder cases or they would include rape or
13 child abuse, that type of thing. Is that kind of where you
14 fall, or --

15 A. Probably not. I mean, I think it would depend
16 on each individual case.

17 Q. Okay. Are there any particular cases that you
18 followed in the media that come to mind when you think
19 about, you know, an appropriate case for the death penalty?
20 You may have heard or read about it and think, gee, that
21 person deserves a death penalty or that type thing?

22 A. Now, of course, my mind goes totally blank.

23 Q. We understand.

24 A. Um, I'm sure there -- there have been, um.

25 Q. Let me ask you this, just one question about

1 your questionnaire kind of following up on your experience,
2 recent experience, on the jury. On page 5, I think you have
3 the questionnaire in front of you. Kind of the bottom part
4 of the page, we give people these statements and ask whether
5 they agree, disagree, or unsure.

6 A. Are you going to ask about the second one?

7 Q. Yes, ma'am.

8 A. Because I read over this whole thing and I
9 went, why did I do that? I mean, that is the one I picked
10 out and went, well, so that's interesting, because I
11 thought, I don't agree with that.

12 Q. Okay. You just marked it wrong?

13 A. (Prospective juror nods head.).

14 Q. Okay. I was worried because you had just been
15 on a jury and then --

16 A. Exactly. I mean, that's -- because that is
17 the one I picked out and went, why did I say that?

18 Q. Was there anything else when you reviewed your
19 questionnaire that was like, you know, why did I say that?

20 A. No, nothing popped out like that.

21 Q. Okay. I guess you feel fairly strongly about
22 the death penalty. And I say that because we ask people to
23 rank themselves on a scale of 1 to 10 on how strongly they
24 feel and you gave yourself an 8, which is kind of towards
25 the high end. But I know it means different things to

1 different people. What did that 8 mean to you?

2 A. It just meant that it's not something that I'm
3 afraid of. It's not something that, um, you know,
4 discussions about the death penalty have never really
5 entered into my day-to-day, you know, conversations.

6 Q. Usually don't with people.

7 A. Yeah. And there was a circumstance several
8 years ago where there was a woman who had been convicted of
9 murder and was receiving the death penalty and prior to that
10 had made a profession of Christian faith and it made the
11 headlines.

12 Q. I think that was Carla Faye Tucker?

13 A. Yeah, I couldn't remember her name. And, you
14 know, during that time, you know, there was a lot of
15 discussion going on about the death penalty. And even
16 through that all, it was never that she hadn't committed the
17 crime. And if that was the consequence of that and if she
18 had made a profession of faith, the worst thing that was
19 going to happen to her was not death, you know, that was
20 stepping into a new life. So even at that, I didn't feel
21 that the death penalty was the wrong, wrong thing.

22 Q. Okay. You thought, I guess, Governor Bush at
23 that time made the right decision?

24 A. Oh, I didn't even realize it was him. Yeah,
25 you know, but it would have been just as fine with me had he

1 overturned it, you know.

2 Q. Sure.

3 A. But --

4 Q. But I guess it didn't offend you that the
5 sentence was carried out?

6 A. No.

7 Q. Okay. Let me kind of take it, your thoughts
8 and views on the death penalty to another, kind of the next
9 level of analysis, I guess. And many people probably hadn't
10 ever thought about this and we know that. But, you know,
11 oftentimes crimes are committed by more than one person.

12 A. Uh-huh.

13 Q. You have a group or gang of individuals that
14 commit crime. The law allows us to prosecute everybody that
15 was actively involved in a crime, every active participant,
16 whether it be something like a shoplift or all the way up to
17 capital murder.

18 And, frequently, when you are talking
19 about murder or capital murder you may have a situation
20 where you just have one person that actually pulled the
21 trigger maybe. One person that actually caused the death.
22 For lack of a better word we call them the triggerman. But
23 you may have other people who were actively involved as
24 well. You may have heard the term "accomplices"?

25 A. Uh-huh.

1 Q. You may have accomplices to that crime who
2 didn't actually cause the death. And the law allows,
3 depending on the facts and circumstances, for both the
4 triggerman and the nontriggerman accomplices to be
5 prosecuted for capital murder and ultimately receive the
6 death penalty. And a lot of people kind of draw some
7 distinctions on those, those type of facts.

8 A lot of people who are very strongly in
9 favor of the death penalty say, you know, I believe in the
10 death penalty for the triggerman, but, you know, if it was
11 up to me, if I was Governor for a day or religious, morally,
12 or ethically, I don't see the death penalty for the
13 accomplice, because they didn't actually cause the death.
14 You know, I may want to lock them up in prison for life, but
15 I just don't think the death penalty is justified.

16 Other people think differently. Looking
17 on the facts and circumstances, they could see maybe where
18 the death penalty would be justified for the accomplice.
19 But I'm just kind of wondering where you come down on that
20 issue.

21 A. I don't know. I think that each person is
22 tried individually on its own merits. I'd just have to
23 hear.

24 Q. Okay. Let me kind of explain to you how the
25 law works and let me use an example or hypothetical and try

1 to illustrate how the laws works. Let's say the other
2 prosecutor, myself and Mr. Shook, decide we're going to rob
3 a bank.

4 The plan we come up with is for him to
5 take a loaded gun in. He's going to hold up all the
6 tellers. And while he's holding them up and holding them at
7 bay, I'm going to come in unarmed with a bag and clean out
8 the cash drawers and collect all the money. Let's say when
9 we go to do that bank robbery, for whatever reason, maybe
10 one of them looks at Mr. Shook funny or maybe I see one of
11 them going for a silent alarm to call the police and I tell
12 him that, but for whatever reason he shoots and kills the
13 teller, an intentional murder in the course of a robbery.

14 He's the triggerman. He could,
15 obviously, be prosecuted for capital murder and ultimately
16 sentenced to death, depending on what the jury thinks. But
17 the law also allows me, the accomplice, the nontriggerman in
18 that scenario, depending on the facts and circumstances, to
19 also be prosecuted for capital murder and ultimately maybe
20 face the death penalty. What do you think about that?

21 A. I agree.

22 Q. Okay. You see kind of the sense in maybe
23 keeping that option open for the accomplice?

24 A. Yes.

25 Q. Okay. What purpose do you think that serves,

1 being able to prosecute an accomplice, I guess, for capital
2 murder or for the death penalty?

3 A. Well, if we're looking at your example. You
4 each had the same amount of responsibility. You each
5 planned the act together. You knew exactly what you were
6 going to do and you went at it as a team.

7 Q. Okay. That's frequently what people tell us.
8 Sounds like you're exactly where the law is. What the law
9 says is for an accomplice like me to be convicted of capital
10 murder and ultimately face the death penalty, there's two
11 ways for that to happen.

12 One is if I actively encourage or direct
13 or solicit, in my example, Mr. Shook, to commit that murder,
14 of course, I would be guilty. The second way would be is if
15 we conspire together to commit one crime, the bank robbery.
16 We just made an agreement to commit that, you know, murder
17 happens during that crime, and the law says if the jury
18 thinks that the accomplice should have anticipated that a
19 life could be taken during that bank robbery, then I could
20 be found guilty of capital murder and ultimately face the
21 death penalty. Does that make sense to you?

22 A. Yes.

23 Q. You just kind of, I guess, look at the facts
24 and circumstances and look to see under that conspiracy law
25 whether you think, you know, in my example, whether I should

1 have anticipated, based on what happened, that a life could
2 be taken. Does that make sense to you?

3 A. Yes, it does.

4 Q. Okay. The reason I go into that kind of in
5 detail is just to be up front with you and put all our cards
6 on the table. We are prosecuting Mr. Murphy as an
7 accomplice and that's why we spend so much time going over
8 that aspect of the law and making sure that potential jurors
9 are comfortable with that aspect of the law, because we need
10 to talk to you about it now, because once you get over in
11 the jury box, it's kind of too late.

12 And we never want to put anybody in a
13 position where, you know, maybe what their conscience or
14 moral or religious or ethical base dictates is kind of at
15 loggerheads with the law.

16 A. Right.

17 Q. And that's why we go into it. Let me switch
18 gears real quick. You indicated, like just about everybody
19 we talked to, in fact, almost everybody we talked to, 99.9
20 percent of the people, that you had heard something about
21 this case. We know it was a high profile case in the media.
22 We recognize that. And the law recognizes those type of
23 situations.

24 What the law says is just because you
25 have heard about the case in the media, you are not

1 disqualified from being a juror. I mean, obviously, if that
2 were the law, we would never get a jury in these type of
3 cases. But what the law says is in order to be a qualified
4 juror, as long as you can kind of put to the back of your
5 mind what you've heard, even if you may have formed some
6 impressions or opinions about the case, as long as you can
7 kind of put them to the back of your mind and just base your
8 verdict on the case on the facts and evidence that you hear
9 in the courtroom, you'd be a qualified juror.

10 And I hope you agree with me, usually the
11 best source of information is not the media. It's what
12 comes in the courtroom. So that's kind of the bottom line
13 question for every juror. Do you think you can just base
14 your verdict on what you hear in the courtroom?

15 A. Yes.

16 Q. Okay. You wouldn't let anything you have
17 heard influence you or anything like that?

18 A. No.

19 Q. Okay. Do you remember what you have heard
20 about this case?

21 A. Since May? You know, once May came and we
22 found out, then all of a sudden you start hearing things.
23 But prior to that, nothing except right in the midst of it,
24 you know, that when they had escaped --

25 Q. When it was happening --

1 A. And the hunt for them and that they had gotten
2 to Colorado and they had been caught and then brought back.
3 And really, after that --

4 Q. Just kind of the big picture or the broad --

5 A. Yeah.

6 Q. Not a lot of details?

7 A. Yeah.

8 Q. Have you heard something different since May?

9 A. No. Well, actually, I did, that I didn't
10 realize that one of them had committed suicide or had died
11 in Colorado during that. And I'm sure I had heard that at
12 the time, but it didn't --

13 Q. Didn't click?

14 A. It didn't -- yeah, I didn't remember that
15 until --

16 Q. Okay. Have you kept up with any of the
17 subsequent court proceedings in the case or heard anything
18 about those?

19 A. Not really.

20 Q. Okay. So it sounds like really you don't have
21 a whole lot of details that might influence your verdict in
22 this case?

23 A. No.

24 Q. You'll just listen to the facts and evidence
25 and whatever that be?

1 A. Right. Whatever that be.

2 Q. Okay. You know, like I said, we talk to a lot
3 of folks who are in favor of the death penalty, some very
4 strongly, philosophically or in the abstract, you know, when
5 you talk about it. I think for a lot of people when they
6 get down here at this point in the process, it becomes a
7 little more real, not quite so abstract, not quite so, you
8 know, philosophical. You are actually in the courtroom.
9 You are looking at a person.

10 The State, you know, to be frank with
11 you, it's our goal because we feel we have the type of
12 evidence that's going to convince a jury that he be
13 convicted of capital murder and answer those questions in
14 such a way that he'll receive the death penalty. But I
15 think when you get in this point of the process, it becomes
16 something a little different for a lot of people.

17 A. Right.

18 Q. So I want to make sure that, you know,
19 comfortable is probably a bad word, but at least you don't
20 have any hesitation about participating in this process that
21 may ultimately end up taking a life.

22 We talk to some people who say, you know,
23 I don't want that on my conscience. I don't want that in
24 the back of my mind. The media typically reports some
25 details of executions. You read about them in the paper and

1 maybe hear about them on the news, like you did with Carla
2 Faye Tucker. Some people tell us, you know, I just don't
3 want that on my conscience. I believe in the death penalty.
4 I'm just not the right type person to do it for whatever
5 reason.

6 And so we always ask people, because we
7 know it's not everybody's cup of tea. Just to let you know
8 the procedures that are followed in a death penalty case,
9 having spent some time in Texas you know we're typically the
10 leader among states in executions.

11 A. Oh, I didn't know that.

12 Q. The death penalty is very real here. Our
13 juries assess it, it's carried out. Again, we typically
14 lead the nation in the number of executions. The procedures
15 are the same in any case. Are you familiar with our method
16 of execution in Texas?

17 A. Injection.

18 Q. Yeah, exactly, by lethal injection. The
19 procedures are same. If a jury finds a person guilty of
20 capital murder and these three questions that you see up
21 here are answered in a certain way, the Judge has no
22 discretion. He will sentence the defendant to death. The
23 person will be taken immediately to death row where he will
24 wait for Judge Cunningham to issue a date of execution at
25 some point in the future.

1 I can't tell you when or how long it will
2 be, but on that date of execution he would be moved from
3 death row to a holding cell in the main prison of
4 Huntsville, Texas, where the death chamber is. And on that
5 last day he'd be given a chance to meet with friends,
6 family, spiritual advisors. He'd be able to eat a last
7 meal, if he wanted to, or if he could.

8 But as it got close to 6:00 p.m., which
9 is the time that's mandated for executions in Texas, he'd be
10 moved from that holding cell into the death chamber, either
11 voluntarily or involuntarily. He would be forced to go, if
12 he didn't want to. You may have seen a picture of that
13 death chamber, I don't know. Sometimes the media shows it.
14 It's a gurney with leather straps. But he'd be taken in
15 there, strapped down to the gurney, and an IV would be
16 started in his arm.

17 There'd be witnesses for his side. There
18 would also be witnesses for the victim's side. The warden
19 would come in and give him a chance to make a last statement
20 for a few minutes. He may beg for forgiveness, you know,
21 much as I guess Carla Faye Tucker did, certainly. Or he may
22 proclaim his innocence to the very end.

23 But after he's given that chance to make
24 that last statement, the warden would signal the
25 executioner. The executioner would release poisons into the

1 IV. Very quickly his heart and lungs would stop. He'd
2 become unconscious and fall into a deep coma and die very
3 quickly after that.

4 And I go through that, not to be morbid
5 about it, but just so you know kind of what you're getting
6 yourself into, because those are the type details that are
7 typically reported in the press. I want to make sure that
8 you feel, you know, as you sit there right now, that you are
9 the type of individual who can take pen in hand and maybe
10 answer these questions in such a way that would lead to the
11 execution of an individual. Do you think you're the type
12 person that could do that?

13 A. Would I want to do it? No.

14 Q. I don't think we'd want anybody who wanted to
15 do it.

16 A. Um, yes, I could.

17 Q. Okay. Why do you say that?

18 A. Um, I don't ever want to sit in judgment of
19 another individual, but I also feel that if ever I was
20 sitting and needing to be defended and needing twelve people
21 to hear my case, I want people who are there who feel that
22 they are there not just out of obligation, but they are
23 there to exercise that wisdom and that discernment and to be
24 able to hear each side. Because I would want to have the
25 courage to say no, I don't believe that he deserves this, as

1 well as the courage to say, yes, he does.

2 Q. Okay. So you feel you're the type person that
3 could participate in this process?

4 A. Yes.

5 Q. Okay. Just to give you some background. Did
6 you, on the jury you were on, did y'all set punishment for
7 the individual?

8 A. No.

9 Q. The Judge did that?

10 A. Yes.

11 Q. In Texas, all criminal trials are kind of
12 broken down into two parts. The first phase, being the
13 guilt/innocence, which is what you heard on your case.

14 A. Yeah.

15 Q. The focus there is whether the State proved to
16 you what's in the indictment. And I think you've had a
17 chance to look at the indictment in this case.

18 A. Right.

19 Q. Which is where we allege what we think
20 happened. And if the jury feels the State has met their
21 burden, if they've proved the guilt beyond a reasonable
22 doubt for each and every element in that indictment, then he
23 will be found guilty of capital murder. Then the second
24 phase, the punishment phase, of the trial, will start.

25 The rules of evidence in that second

1 phase broaden and you get to hear extra information to help
2 you answer these three questions. And we kind of let the
3 answers to those questions determine the proper verdict. We
4 don't ask a jury to make a decision, you know, to write in a
5 life sentence versus a death sentence. We ask them to
6 answer these three questions. And that's what I want to
7 talk about with you for the next few minutes.

8 I know you've looked at them before, but
9 if you could look at them up on the wall, they are phrased a
10 little bit differently. And if you could just take a moment
11 or two and read those to yourself.

12 A. (Prospective juror complies.)

13 Q. Did you get a chance to look at those?

14 A. Yes.

15 Q. Okay. These are the three questions. They're
16 called Special Issues, but they're really questions. Some
17 people made the comment, they're poorly drafted from a
18 grammatical sense. Your legislature did that. The lawyers
19 here didn't. The Judge didn't. So, if you have any
20 critique of that, it's not for us.

21 That first question -- these are
22 questions you'll be asked to answer again in punishment.
23 What the law pretty much envisions is, even though you found
24 a person guilty of capital murder, you start the second
25 phase of the trial kind of with an open mind, go back and

1 look at the evidence you've heard in the first phase, look
2 at whatever you've heard in the second phase, basically,
3 that you don't have any preconceived notions or prejudgments
4 to the answers to these questions.

5 But the first question is basically what
6 we call the future danger question. We ask the jury to
7 decide whether there's a probability that the person would
8 commit criminal acts of violence that would constitute that
9 continuing threat to society. You see how that question
10 kind of asks a juror to make a prediction?

11 A. Now, you said though that after, after the
12 guilt or innocence is determined, that the Judge will give
13 you further information. Is that further background
14 information?

15 Q. Typically, what happens, if you find a person
16 guilty of capital murder, it's kind of like a second trial
17 in a sense. Both sides, the State and the defense -- of
18 course, the defense doesn't have to, because they never have
19 to do anything. They don't have a burden. But typically
20 you hear extra information about a person's past, criminal
21 history if it exists, good things he's done, bad things he's
22 done, character witnesses, reputation witnesses.

23 And at the end of that evidence in the
24 second phase, then the Judge would give you these questions
25 to answer.

1 A. Okay.

2 Q. That's kind of how it works. But do you see
3 how that question kind of asks for you to make a prediction
4 about future behavior?

5 A. Yes.

6 Q. Is that something you think you would be
7 comfortable doing?

8 A. Based on further information, yes.

9 Q. Sure. What type of further information do you
10 think you'd like to hear?

11 A. Well, if the violent crime was one of many,
12 you know, previous incidences, that it's, you know, it
13 wasn't a one-time-only occurrence.

14 Q. Okay. A person's criminal history, if it
15 exists?

16 A. Right.

17 Q. That type thing. And again, you can go back
18 and look at the evidence you heard in the first phase, the
19 crime that he's been convicted of, to help you answer that.

20 A lot of these words in these Special
21 Issues aren't necessarily defined. The law kind of leaves
22 the definitions up to the jurors' common usage and good
23 common sense. So we typically ask jurors kind of what comes
24 into their mind or how they would define a certain term.
25 And see that word "probability"?

1 A. Yes.

2 Q. What comes to mind when you think of the
3 definition of that word?

4 A. That there is a chance that they would commit
5 a violent act again.

6 Q. Okay. We hear that a lot. The little
7 guidance the law gives us is, obviously, a probability is
8 not a complete, you know, or not beyond all doubt. It's not
9 a certainty because we could never prove anything to a
10 certainty. But it's something more than a possibility,
11 because anything is basically possible. A lot of times we
12 hear more likely than not, or a likelihood, that type thing.
13 Is that a definition you are comfortable with?

14 A. Yes.

15 Q. Okay. Then you have that phrase in the middle
16 line, "criminal acts of violence." What comes to mind when
17 you think about that phrase, what type of acts?

18 A. To me, a criminal act of violence is against
19 an individual.

20 Q. Okay.

21 A. And it says to me that that individual acts
22 out in a rash manner with, and it's like I said, just
23 against an individual.

24 Q. Any particular type of crimes or acts that
25 come to mind when you think about that phrase, "criminal

1 acts of violence"?

2 A. Um --

3 Q. Obviously, I guess, murder?

4 A. Obviously, murder. I mean, anytime that it's
5 against another individual to me is a criminal act of
6 violence.

7 Q. Assaults, rapes?

8 A. Yeah.

9 Q. Threats of violence, that type of thing?

10 Okay. Finally the last word in that question, "society."
11 How would you define it or what do you think of when you
12 think of society?

13 A. People as a whole.

14 Q. Just everybody?

15 A. Yeah.

16 Q. Everybody and anyone he may come into contact
17 with?

18 A. Right.

19 Q. Okay.

20 A. I mean, if it's in prison, that's his society.

21 Q. Okay. Like the prison guards or the teachers
22 or ministers that work in prison, that type thing?

23 A. Right, yes.

24 Q. Okay. Special Issue No. 1 kind of starts off
25 with a no answer, okay? That's kind of the default setting.

1 And as part of our burden of proof, we have to prove to you
2 as a juror beyond a reasonable doubt that the answer should
3 be yes, okay? So unless we prove to you beyond that
4 reasonable doubt, that answer stays no. Does that make
5 sense to you?

6 A. Yes.

7 Q. The second question is exactly the same. It
8 starts off with that no answer and it's part of our burden
9 of proof to prove it to you beyond a reasonable doubt that
10 the answer should be yes. That second question deals kind
11 of with the scenario that we've already talked about where
12 you have an accomplice.

13 There's really three parts to that
14 question. If you think the person actually caused the
15 death, he was actually the triggerman, it would be pretty
16 easy to answer that first part of that question. Or if you
17 think he intended to kill the deceased or another, didn't
18 actually pull the trigger, but intended to, then you'd
19 answer it yes. Or, finally, that last line, if you found
20 that he anticipated that a human life would be taken. And
21 that's kind of what we've already talked about.

22 I want to point out one distinction to
23 you, though. If you'll recall, in order to convict an
24 accomplice or find him guilty of capital murder, the jury
25 would have to be convinced that the person should have

1 anticipated that a life would be taken, okay? That gets
2 them to guilty. In order to get through these questions and
3 to get to the death penalty, the law requires that we prove
4 to you that not only the person should have anticipated, but
5 they did actually anticipate, that they did anticipate.

6 Does that make sense?

7 A. Yes, it does.

8 Q. The law draws a distinction there. It's a
9 little bit higher burden and it's important to be qualified
10 that you kind of see that distinction.

11 One example I use sometimes to point out
12 a situation where somebody should have anticipated, but
13 didn't, was my first car that my dad got me at 16. I drove
14 it like a madman for about a month before I managed to wreck
15 it. And he got very mad at me and he said, what were you
16 doing? You should have anticipated the way you were
17 driving, this would happen. And I was so young and dumb, I
18 didn't actually anticipate, but certainly I should have,
19 looking at what I was doing with that car. So does that
20 make sense to you?

21 A. Yes, it does.

22 Q. Okay. And again, that question starts off
23 with a no and it's up to us to prove it to you, it should be
24 a yes.

25 Special Issue 3 is a little bit

1 different. This is kind of the last question or the last
2 step in the process. But neither side has the burden on
3 that question. It doesn't start off with that no answer.
4 We just leave it up to the jurors' good common sense.

5 This is what we call the mitigation
6 question. And we kind of ask jurors to go back and look at
7 the facts and circumstances of the offense, look at what you
8 may have learned about his past, his background, and what
9 kind of blame he bears for the crime, and ask yourself is
10 there anything mitigating? Is there anything that kind of
11 lessens his moral blameworthiness? And if there is, is it
12 sufficient that his life ought to be spared, that he should
13 be given a life sentence, rather than a death sentence.
14 Does that make sense to you?

15 A. Yes.

16 Q. Okay. What do you think about having a
17 question like that?

18 A. I think it covers all the, all the
19 possibilities. I don't -- I don't know what mitigating
20 circumstances could be, you know, until you hear them. But
21 I'm real glad that that is there.

22 Q. I guess it's basically a chance for a jury to
23 show mercy, if they think it's appropriate.

24 A. Yeah.

25 Q. And you are kind of right on track with the

1 law. The law doesn't require you, as you sit there right
2 now, to tell us something you think is mitigating. You
3 don't have to consider any potential piece of evidence
4 mitigating. But as you've had a chance to kind of reflect
5 on that question for a few minutes, does anything pop into
6 your head that you might think is mitigating in a case such
7 as this?

8 A. No, because I don't know enough about it to --

9 Q. Okay. That's the most common answer we get.
10 Again, I hope, you know, you don't sit around thinking about
11 what is mitigating in a death penalty case.

12 But oftentimes people tell us that maybe
13 the way a person was raised, you know, maybe if they had a
14 bad upbringing, mental, physical, emotional abuse, if they
15 were abused, that type of thing, they may consider that
16 mitigating. Other people tell us, you know, I may feel very
17 sorry for them, but, you know, you're kind of a moral free
18 agent at some point. You can make choices and you've got to
19 be held accountable for them. Where do you kind of come
20 down on that type of issue?

21 A. That we're responsible for the choices that we
22 make.

23 Q. Okay. Some people talk about age. Just to
24 let you know, you have to be 17 or over to be prosecuted for
25 the death penalty in Texas. Some people think if a person,

1 or the defendant, is very young, that may be mitigating.
2 Again, other people say, you know, at some point you're old
3 enough to make your own decisions and have to be held
4 accountable. What do you think in a situation like that?

5 A. Well, it's interesting, because one of the
6 questions in here was about youthful, and, you know, well,
7 define --

8 Q. And we never defined it for you.

9 A. Yeah. Yeah.

10 Q. Yeah, I know. It's unfair.

11 A. You know, and so, I still think that, you
12 know, if the age that the law has set is 17, then they're
13 just as responsible of making the right choice as someone
14 who is over 65.

15 Q. And that's what a lot of people tell us. The
16 main point, in order to be a qualified juror, is that you
17 can just tell us that you can keep an open mind. You don't
18 have to tell us what it is, but you will keep an open mind
19 and listen for it, and if it exists. You will consider it.

20 And that's basically what the law
21 requires, basically, that you see value to that question,
22 having kind of that last step in the process to, I guess,
23 give a jury a chance to show mercy, if they feel it's
24 appropriate. Does that make sense to you?

25 A. Yes, it does.

1 Q. Okay. And kind of the bottom line with just
2 about everything we're talking about, but particularly these
3 Special Issues, you just have to keep that open mind. You
4 can't prejudge. Some people tell us, very frankly, they
5 tell us, you know, if I found somebody guilty of capital
6 murder, it's going to influence how I answer these questions
7 automatically. You know, just because I found somebody
8 guilty of capital murder, I'm automatically going to answer
9 1 yes or I'm automatically going to answer No. 3 no, that
10 type thing.

11 If you feel that way, that's fine, you're
12 just simply not a qualified juror, because the law really
13 envisions and contemplates, I think, a thoughtful,
14 deliberate juror who will keep that open mind, even to that
15 last step in the process. Does that make sense to you?

16 A. Yes, it does.

17 Q. And, of course, you can go back and look at
18 that, the crime, and it may help you answer it. And you may
19 not think about it long, but as long as you can tell us, you
20 have that open mind, you'd be qualified. Does that make
21 sense?

22 A. Yes, it does.

23 Q. Okay. Let's visit a little bit about some of
24 the laws and rules that apply in every criminal case.
25 Hopefully, these will be familiar to you from your past

1 experience. But the defendant is always presumed innocent.
2 That's another way of kind of holding us to our burden of
3 proof. If we all packed up and went home right now, he'd be
4 found not guilty.

5 The State has to present evidence and we
6 have to prove it to you beyond a reasonable doubt that he's
7 guilty of capital murder and that No. 1 and 2 should be
8 answered yes. And if we don't do that to you, we simply
9 fail to meet our burden of proof, and, you know, you might
10 be required to find him not guilty, or answer 1 and 2 no.
11 Does that make sense to you?

12 A. Yes, it does.

13 Q. Okay. You've always got to look to this table
14 for the proof. You can't require these folks to do
15 anything. They can sit there and do crossword puzzles and
16 never do a thing, legally, if they wanted to. Now, they're
17 very fine lawyers and I don't anticipate they're going to do
18 that. But the point is, you just can't look to that table
19 for any sort of proof. You always have to look to us. Does
20 that make sense?

21 A. Yes, it does.

22 Q. Okay. You probably remember a person's Fifth
23 Amendment right. A person that's charged with a crime has
24 an absolute right not to be forced to testify. If he
25 doesn't want to testify, no one can force him. Conversely,

1 if he wants to testify, no one can stop him.

2 But if he does not testify, you will be
3 instructed by the Judge, and this is what the law is, that
4 you can't consider that against him. It's just simply a
5 nonfactor. You can't hold it against him or even consider
6 it during your deliberations. Does that make sense to you?

7 A. Yes, it does.

8 Q. It's just kind of another way of holding us to
9 our burden of proof and that type thing. Let's talk a
10 little bit about the type of witnesses that you may hear.
11 This is a criminal case, so you can probably guess you're
12 going to hear from police officers. I know you indicated
13 you had a friend who at one point was a Carrollton police
14 officer?

15 A. Uh-huh.

16 Q. But what the law says is you can't start a
17 witness out or give them a leg up, just because of what they
18 do for a living, even police officers, even though a lot of
19 people respect them. You've got to start them off on that
20 same level of credibility. Is that something you think you
21 could do?

22 A. Yes.

23 Q. Okay. Sometimes you hear from psychiatrists
24 or psychologists. The defense or even the State or
25 sometimes both sides will call them to try to give the jury

1 some insight into answering these three questions. What are
2 your feelings generally about those type of folks?

3 A. I think that they're definitely needed. As
4 far as a witness, what do I think about them?

5 Q. Uh-huh.

6 A. Um, unless they've had time to actually spend
7 time with the defendant and, you know, and can speak from
8 that experience. I mean, if they're just coming in saying,
9 oh, as I've, you know, read about this case, then, you know,
10 I don't know that they have a whole lot of credibility.

11 Q. Okay.

12 A. But if they have, you know, a personal, have
13 spent personal time with them, then --

14 Q. And that's what we hear frequently. Again,
15 the law says you've got to treat them like any other
16 witness. You know, a lot of people are just closeminded
17 because they don't trust those people. A lot of people
18 believe every word out of their mouth. The law says you
19 start them at the same level of credibility. If they make
20 sense, go with them. If they don't, they don't.

21 As part of our burden of proof, as I
22 said, we've got to prove each and every element to you.
23 Kind of a ridiculous example to illustrate that point, is
24 one of the elements we have to prove is the county the crime
25 happened in. If we get the county wrong, obviously we've

1 been horribly negligent and we'd be fired and rightly so at
2 that point. But, you know, if we got the wrong county, the
3 Judge would instruct you we missed an element.

4 No element is more important, legally
5 speaking, than another element, and you would be instructed
6 to find the person not guilty. A lot of people don't like
7 that. They think it's a technicality, and I kind of agree
8 with them. But, nevertheless, it's the law and you'd be
9 required to do it. Does that make sense to you?

10 A. Yes, it does.

11 Q. Okay. Just a couple more things I want to
12 touch on, my time is kind of winding down here with you.
13 I'm sure you're happy about that. But let's talk a little
14 bit about the parole law. You hear about this. As I said,
15 there are two options for capital murder, the death sentence
16 and a life sentence.

17 What a capital life sentence in Texas
18 means is that the person serves forty years, day for day,
19 before that person becomes eligible for parole. They may
20 make parole right then after forty. They may never make
21 parole and actually serve a life sentence. Because those
22 decisions are kind of beyond and in the future and beyond
23 anyone's control, we ask that a jury presume that life means
24 life, that type thing. Does that make sense to you?

25 A. Yes.

1 Q. Do you think you could do that?

2 A. Yes.

3 Q. Okay. One last area and then we'll wrap it
4 up. These things we call lesser included offenses.

5 Sometimes in that first phase, the guilt phase, let's say
6 you didn't think the State proved the murder to you. But
7 you thought they proved the robbery. You may have the
8 option of finding a person guilty of aggravated robbery,
9 because we didn't prove the murder.

10 In that situation these questions are
11 kind of thrown out the window and we just ask a jury to
12 sentence someone anywhere between five years all the way up
13 to life, depending on the facts and circumstances. And we
14 just ask a juror to be able to keep an open mind before they
15 know anything about the case to that full range of
16 punishment. Is that something you think you could do?

17 A. Yes.

18 Q. Okay. Any questions for me? I know we've
19 covered quite a bit real fast.

20 A. No.

21 Q. Okay. Thank you so much for your time,
22 Ms. Mitchell.

23 A. Thank you.

24 THE COURT: Mr. Sanchez.

25 MR. SANCHEZ: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SANCHEZ:

Q. How are you doing today, ma'am?

A. I'm fine, thank you.

Q. Do you need some water or anything? I know you've been up there for a while.

A. No, I'm fine.

Q. Okay. All right. My name is Juan Sanchez and I'm going to ask you some questions here on behalf of Mr. Murphy and the defense. And before I start, like, I just want to let you know again that, you know, you made the cut, like Mr. Wirsky said, and once you get down here, though, I mean, we -- they explain the law to you and it's our job to explore areas of where you may have problems with the law or where your honest feelings may conflict with the law.

And, you know, I think when people are asking you to follow the law, everybody says yes. But then when you're asked about certain situations or they're put in a certain situation, somehow maybe their personal beliefs, their moral beliefs, conflict with the law and they may have a problem following the law in those instances.

I've tried many jury trials and some things you talk to jurors afterwards and, you know, they told you they could follow the law, but then they say, well,

1 but in this instance I really had a big problem, and maybe
2 if it was asked a certain way before, I would have told you
3 that, but -- so that's the reason we're going to ask you all
4 these questions. Okay? Is that all right?

5 A. That's fine.

6 Q. Okay. You've indicated on your questionnaire
7 and in questioning today, you know, your feelings are pretty
8 strong for the death penalty. And one of the concerns we
9 may have is that sometimes jurors can get on these trials as
10 a juror and in their mind, you know, a life sentence may not
11 even be appropriate in a capital murder case.

12 They may think, well, you know, once I
13 find him guilty of capital murder, then the game is over.
14 Unless somebody proves to me otherwise, unless they can show
15 me why I should give him a life sentence, I'm probably going
16 to give them a life sentence -- I mean a death sentence, or
17 answer the questions in a way that will result in death.
18 What do you think about that?

19 A. I would never presume death for anyone.

20 Q. Okay.

21 A. Um, it would definitely have -- I'd have to
22 hear every bit of the testimony and all mitigating
23 circumstances.

24 Q. All right. And your posture, then, would be,
25 then, first of all, I'm going to start off presuming him to

1 be innocent, unless the State can prove to me otherwise?

2 A. Correct.

3 Q. Then that's where he'll stay. Is that your
4 posture?

5 A. Yes, it is.

6 Q. All right. Because I guess you had made a
7 comment before saying some crimes are so heinous, or
8 heinous, I can't even talk today. It's early in the
9 morning. I hope I'm not speaking fast. The Court Reporter
10 hasn't looked at me yet, so.

11 But you had made a comment that, you
12 know, some crimes are so heinous that you don't see any
13 reason why they should sit in jail. We should just go ahead
14 and give them the death penalty. And that's the reason I
15 ask that question. Based on that comment you made, would
16 you like to explain that a little further or what did you
17 mean by that?

18 A. I think that's obvious. I mean, you know, we
19 can all think of, you know, serial crimes and different
20 types of crimes that, you know, you can't really even think
21 about because they are so awful. And, you know, that would
22 be really hard for me to sit on a jury like that, just
23 because of the type of information that you would be hearing
24 and seeing during that time. But that person who is sitting
25 would still start presumed innocent.

1 Q. Well, as you know, here the allegation is that
2 the death of a police officer. Some people say that's,
3 well, I can keep an open mind as to a life sentence, if it
4 involves another type of capital murder. But when it comes
5 to the killing of a police officer, in that instance I may
6 not be a fair juror and I may, you know, start that person
7 off with a death penalty in my mind, and then I'd have to be
8 convinced otherwise. Would that change in any way what you
9 think?

10 A. I don't think I would start out with the death
11 penalty in my mind for anyone. I mean --

12 Q. Okay. Mr. Wirskye talked to you a little bit
13 about media coverage, and, of course, everybody has heard
14 something about this case. And they always ask you what you
15 heard and can you put that aside. But the question I always
16 like to ask is, you know, have you formed any opinions based
17 on what you heard? Have you formed any opinions as to what
18 happened or guilt or innocence of anybody based on what you
19 have heard from the media?

20 A. No, I mean, just the facts that, you know,
21 that there was a prison break, there was a search, then
22 there was the crime, and then, you know, then they were
23 apprehended.

24 Q. Uh-huh. When you say you have formed the
25 opinion that there was a crime, obviously --

1 A. Well, yeah.

2 Q. Of course, you know, we say can you put that
3 out of your mind. But sometimes people sit on the jury and
4 that keeps coming up, based on what they heard before the
5 trial, even, right when the trial was starting. And, you
6 know, that puts -- that puts a person who is being tried for
7 this at a disadvantage, if they've already decided that
8 something -- they're guilty of something.

9 A. I have no idea who the triggerman was. You
10 know, until May, I had never heard his name. You know, so
11 as far as those opinions go, I have --

12 Q. Okay. Well, let me ask you this. Since you
13 said that from after May, you learned that something else
14 had happened that you weren't aware of before you came down
15 to fill out this questionnaire. How did you learn that?

16 A. When somebody, you know, when you tell them
17 that you filled out the 17-page questionnaire and then they
18 were like, oh, well, I got called to, you know, to fill out
19 the questionnaire on another one of them. And, you know,
20 until that point, I hadn't even heard that anybody had been
21 tried yet. You know, that there had been other, you know,
22 the other trials had even happened.

23 Q. Okay. And did they talk to you about the
24 trial or did that person make it on the jury?

25 A. No, they did not.

1 Q. Did you do any kind of reading or research on
2 the Internet --

3 A. No.

4 Q. -- to try to find out more things?

5 A. No.

6 Q. One thing I did want to ask you about was the
7 -- when you were talking about the Carla Faye Tucker
8 situation.

9 A. Uh-huh.

10 Q. You said something about, I don't know, tell
11 me again what you said. I think you said something like,
12 that wasn't such a bad thing compared to what could have
13 happened in the afterlife or something to that extent.
14 Could you explain that a little bit to me? It wasn't too
15 clear.

16 A. As a Christian, and that's what she had come
17 to profess, that, you know, we spend this much time on
18 earth, but we spend this much time in eternity. And so the
19 worst thing that could happen to a believer is not death,
20 you know. If her sentence had been overturned and been
21 commuted to life, you know, maybe that, you know, eternity
22 in heaven was a much better eternity than spending however
23 many years she would have in prison. That's just
24 speculation, I mean. That is --

25 Q. Okay. Does that belief some way in your mind

1 maybe diminish a little bit the severity of the death.
2 penalty --

3 A. Oh, no, not at all.

4 Q. -- or anything like that?

5 A. Oh, no.

6 Q. Would that belief in any way affect your
7 deliberations in deciding and holding the State to their
8 burden on the Special Issues in the punishment stage?

9 A. No.

10 Q. Okay. One thing I did want to talk to you
11 about. I mean, you -- it looked like you understood the
12 Special Issues fairly well, better than most people that
13 come down here. And -- but sometimes people don't
14 understand that. They hear about the Fifth Amendment. They
15 hear the fact that, you know, somebody has a right not to
16 testify and it can't be held against them. But they --
17 somehow they think that once someone is convicted of capital
18 murder, that that right may not extend into the punishment
19 stage, or somehow changes things. And I want to cover that
20 a little bit with you.

21 Special Issue No. 2, we're dealing with
22 what somebody is thinking. Would you agree with me on that?
23 What the person who is accused, the person you found guilty
24 of capital murder, what they're thinking at the time it
25 happened?

1 A. Right.

2 Q. Because you have to make a determination
3 whether that person actually anticipated that a human life
4 would be taken, okay? And, you know, some people say, well,
5 you know, for me to answer that question, for me to figure
6 out what he was actually thinking, I probably would have to
7 hear from him. I'd have to have him get up on the stand and
8 say either I was or I wasn't, for me to answer that question
9 in his favor. What do you think about that?

10 A. You know, when it was mentioned a while ago
11 about the Fifth Amendment, I had not even taken into account
12 that it would be a possibility we would actually hear from
13 the defendant. That -- I mean, I didn't even think about
14 that even being a possibility. So as far as would that have
15 entered in my mind as what he was thinking, you know, I
16 hadn't -- I hadn't given that any thought. Um --

17 Q. How do you feel now? Now that --

18 A. Now that I know that? Whether -- ask the
19 question again.

20 Q. Okay. In other words, would you -- would you
21 need to hear from that person in order to answer that
22 question?

23 A. Would I hold it against him, if he didn't
24 testify?

25 Q. Exactly.

1 A. No.

2 Q. Okay. You would make the State prove it to
3 you?

4 A. Right.

5 Q. Just one last question, or actually, two last
6 questions. Lawyers keep asking questions when they say
7 they're only going to ask one more. As far as Special Issue
8 No. 3, you said you found value in it and you said you are
9 glad that's there.

10 A. Yes.

11 Q. But, you know, and sometimes people, you know,
12 in reality, and once you've convicted somebody of killing a
13 police officer and you found him to be a continuing threat
14 to society and you found that they actually anticipated that
15 a human life would be taken, how open would your mind be to
16 Special Issue No. 3? After you've done, after you got all
17 the way down to that point, how open would it be?

18 A. I guess it would depend on whatever had been
19 presented.

20 Q. Okay.

21 A. That would be a mitigating circumstance.

22 Q. And in order for you to answer Special Issue
23 No. 3, would you want the defense to present evidence in
24 favor --

25 A. I would want to hear every bit of evidence

1 that was applicable to the case.

2 Q. Okay. And, but would you want the defense to
3 present evidence for you to answer Special Issue No. 3?

4 A. If it's truthful.

5 Q. Would you require the defense to offer some
6 type of evidence --

7 A. No.

8 Q. -- in order to answer that?

9 A. (Prospective juror shakes head.)

10 Q. All right. I guess the only other question I
11 would have, then, would be is there anything -- well, is
12 there anything based on your background, based on your
13 religious beliefs, that somehow conflicts with the law,
14 conflicts with something possibly in this case that would
15 keep you from being fair to either side?

16 A. No.

17 Q. I believe those are all the questions I have.
18 Thank you.

19 THE COURT: Ma'am, would you be so kind
20 as to give us a few minutes and wait outside and we'll have
21 you back.

22 [Prospective juror out]

23 THE COURT: What says the State with
24 juror No. 2426, Ms. Cathryn Mitchell?

25 MR. WIRSKYE: State has no challenge for

1 cause.

2 THE COURT: Mr. Sanchez?

3 MR. SANCHEZ: No challenge for cause.

4 THE COURT: You need a few minutes?

5 MS. BUSBEE: Yes, please.

6 (Recess)

7 THE COURT: Wirsky, what says the State?

8 MR. WIRSKYE: State will accept the
9 juror.

10 THE COURT: Sanchez?

11 MR. SANCHEZ: We will exercise a strike,
12 Your Honor.

13 THE COURT: That's strike No. 9. Would
14 you be so kind to ask Ms. Mitchell to come back in.

15 [Prospective juror in]

16 THE COURT: Ms. Mitchell, we want to
17 thank you so much for coming down today. I will inform you
18 that you shall not sit on this jury. Maybe it's a burden
19 off your shoulders. But we appreciate your very thoughtful
20 reflection upon these issues and very honest answers. It's
21 a pleasure having you here, but you will not serve on this
22 jury.

23 PROSPECTIVE JUROR: Thank you very much.

24 [Prospective juror out]

25 THE COURT: Ms. Courtney.

1 [Prospective juror in]

2 THE COURT: Good morning.

3 PROSPECTIVE JUROR: Good morning.

4 THE COURT: Welcome to the 283rd. We
5 have juror No. 2527, Ms. Diane Marie Courtney; is that
6 correct?

7 PROSPECTIVE JUROR: Yes.

8 THE COURT: Thank you for being here.
9 Sorry for the delay. We take the first one in, in the
10 morning, we put three people on the docket and the first one
11 in and then the second and the third and so forth. So you
12 were number two checking in this morning so we'll get you in
13 as number two.

14 Obviously, you have had time to review,
15 hopeful more than once, the guide I provided for you?

16 PROSPECTIVE JUROR: Yes.

17 THE COURT: It's a lot of law to give
18 someone first thing in the morning. I hope you had a cup of
19 coffee and are ready to go.

20 PROSPECTIVE JUROR: Yes.

21 THE COURT: I also provided a copy of
22 your questionnaire that you filled out back in May, so you
23 can review some of your answers and the issues that the
24 attorneys will be discussing this morning.

25 The bottom line, as I said in the guide,

1 there are no wrong answers in this process. This whole
2 process is designed to give you a better working
3 understanding of how all this law relates in the real world,
4 not just writing on a piece of paper. The only question
5 that I have to answer at the end of the process is twofold.
6 Number one is do you understand the law?

7 PROSPECTIVE JUROR: Yes, I think so.

8 THE COURT: And, number two, can you
9 follow the law?

10 PROSPECTIVE JUROR: Yes.

11 THE COURT: Those are the questions I
12 have to have answered at the end of this process. The only
13 question I have for you right now is will you be able to
14 serve this Court for a period of two weeks beginning on
15 November 10th?

16 PROSPECTIVE JUROR: Yes.

17 THE COURT: Thank you very much. With
18 that, I shall turn it over to Mr. Shook.

19 MR. SHOOK: Thank you, Judge.

20 DIANE COURTNEY,
21 having been duly sworn, was examined and testified as
22 follows:

23 DIRECT EXAMINATION

24 BY MR. SHOOK:

25 Q. Ms. Courtney, my name is Toby Shook. I'm

1 going to be asking questions on behalf of the State this
2 morning. And as the Judge said, there aren't any right or
3 wrong answers. We just want your honest opinions. I'm
4 going to go over some of the information you put on our
5 questionnaire and then follow up some of your feelings about
6 capital punishment and some of the rules that apply to this
7 type of case. And if you have any questions at any time
8 feel free to ask, okay?

9 A. Yes.

10 Q. All right. I see from your questionnaire that
11 you grew up in Michigan and I think you said the first 22
12 years or so, were you in -- is it Manistee? Am I
13 pronouncing that right?

14 A. Yes, Manistee.

15 Q. Where is Manistee?

16 A. It is between Ludington and Traverse City,
17 right on Lake Michigan in the lower peninsula.

18 Q. Okay. Get pretty cold up there in the winter?

19 A. Very cold.

20 Q. Okay. What brought you down here to Texas?

21 A. My husband's job.

22 Q. Okay. And you've been down here for quite
23 sometime, then?

24 A. About 15 years.

25 Q. How do you enjoy Texas compared to Michigan?

1 A. We really like Texas, and our children are
2 here and married and so we're going to be Texans.

3 Q. Okay. Quite a difference, I guess, in the
4 climates?

5 A. Uh-huh.

6 Q. Which can be good and bad, I guess. Some of
7 the summers get a little hot here, but winters are much,
8 much, much more pleasant, at least temperature-wise. I also
9 saw that, looking at your questionnaire, that you were a
10 part-time student, about two and a half hours a week, at
11 least you were back in May. Is that still going on?

12 A. Yes, yes.

13 Q. Tell us a little bit about that. What are you
14 studying?

15 A. Well, I'm going to the Biblical School at the
16 University of Dallas, and it's a four-year program, and I'm
17 in my second year. And it is -- I'm not taking it for
18 credit, but it can be taken for credit. And it is in the
19 IRPS program, the Institute of Religious and Pastoral
20 Studies.

21 Q. Okay. And what are your goals to take from
22 that?

23 A. I guess just learning more about God.

24 Q. Okay. What types of classes are you taking
25 this year?

1 A. Just the one class and that's New Testament
2 this year. Last year it was Old Testament. And it's an
3 overview of the New Testament.

4 Q. Okay. And that's one day a week?

5 A. Yes.

6 Q. Okay. The fact if you were placed on this
7 jury for a two-week period, then, might possibly mean you
8 would miss two of those classes. But I take it that
9 wouldn't cause a problem for you?

10 A. I have the ability to go to an evening class.

11 Q. All right. So you could switch at least at
12 that point in time?

13 A. Yes.

14 Q. Okay. Let's talk a little bit about capital
15 murder and the death penalty and how you feel about that.
16 You know from listening to the Judge's comments and reading
17 the materials, that this is a capital murder case in which
18 the State is seeking the death penalty. So we like to talk
19 to each juror how they personally feel about it. As a law,
20 are you in favor of the death penalty?

21 A. Well, I am Catholic, and I do pretty much
22 understand what the Catholic church's, you know, view is on
23 it. And, therefore, I guess in my answers in the way I feel
24 is that I, yes, I feel that capital punishment is necessary
25 at times, because I feel that even though we are such a

1 sophisticated country, we can't seem to keep, you know,
2 criminals locked up.

3 Q. Uh-huh. Okay. I know you said that on the
4 questionnaire. I remember you asking or saying that you do
5 understand the church's true teaching, and I have talked to
6 a lot of jurors and talked to a lot of jurors who were
7 raised Catholic or active in the Catholic faith, and they
8 have different viewpoints on that, or I've seen different
9 viewpoints.

10 I know the -- I think it was the Governor
11 of Oklahoma, I believe, is Catholic and he has commented on
12 that. And I was watching a program once where he was
13 talking about that. And some have told me that the Catholic
14 church is totally against the death penalty, and then I have
15 others say no, in certain circumstances, it is actually not.
16 Have you ever studied that, or as a --

17 A. Well, I've read it in the catechism of the
18 Catholic church. But it is a document that's written for
19 the world church. And so you are talking about other
20 countries that do not have the facilities that we have.

21 But one of the -- one of the parts of the
22 document says that if you can keep a person, if you have the
23 ability to keep a person locked up for the desired amount of
24 time, and that person is no longer a menace to society or to
25 other prisoners or guards or whatever, that in that case the

1 death penalty would not be acceptable. But in the case
2 where they are in danger of -- they are dangerous to other
3 people, including inmates and guards, then it is acceptable.
4 That's my understanding.

5 Q. And I remember you mentioned that in the
6 questionnaire a couple of times, and I believe you said from
7 what you knew about the legal system, that that wasn't
8 possible, and that kind of went into your belief system
9 about capital murder; is that right?

10 A. I kind of feel that way. I feel we have a
11 very liberal view of circumstances these days, in that
12 people, you know, it's always someone else's fault or, gee,
13 got in the way of my bullet, or something like that. So I
14 have, you know, I hope it's the correct view, because I very
15 much want to obey my church's, you know, direction. But
16 that's my -- that's my feeling.

17 Q. Right now, though, you don't feel any conflict
18 with the church's doctrine about how you feel about capital
19 punishment or the death penalty?

20 A. No.

21 Q. Okay. What purpose do you think the death
22 penalty serves our society?

23 A. See, I tend to agree that it is a deterrent,
24 and I know that that goes against everything else. I feel
25 that we can't keep people locked up. I think people get off

1 for -- I think they get off for circumstantial reasons. And
2 so, I just, you know, I -- it's just, you know, I'm not
3 sure. And I'm not sure that it would -- that -- I'm not
4 sure that the law protects me as much as it protects the
5 criminal.

6 Q. Right.

7 A. If that makes any sense.

8 Q. Right.

9 A. You know, sometimes I feel that way.

10 Q. From your personal point of view, what types
11 of crimes do you feel the death penalty should be considered
12 for or used as a possible option?

13 A. Definitely for murder.

14 Q. Okay.

15 A. And I guess there probably aren't too many
16 more than that.

17 Q. So you would reserve it for some type of
18 murder case or --

19 A. Yes.

20 Q. Okay. That's how it is in Texas right now.
21 There are only certain types of murder cases, in fact, that
22 are reserved for the death penalty. We have some brutal
23 murders that can occur and can only get a life sentence. In
24 Texas for the death penalty to become an option, it has to
25 be murder plus some other aggravating fact.

1 First of all, it has to be an unjustified
2 homicide. It can't be self-defense, not an accident, an
3 intentional murder. You might have to form the intent or
4 could form the intent in a split second, but you still have
5 to have that intent to murder someone and actually carry it
6 out.

7 A murder during the course of a felony --
8 I think these were in the materials, but I want to go over
9 them real quickly. Like someone that robs a store, a
10 convenience store, and they murder the -- or shoot the
11 teller, or the clerk there. That could be a death penalty
12 case.

13 Also, murder, if someone breaks in a
14 home, a burglary, and murders someone in the home, that
15 could be. During a rape, kidnapping, or arson, those types
16 of crimes.

17 Also, murder of specific individuals such
18 as a police officer on duty, fireman on duty, prison guard
19 on duty, murder of a child under the age of six, murder for
20 hire, if someone does it for money like a hitman situation.
21 And then murder of more than one victim in either a serial
22 killer situation or a mass murder situation.

23 But those are the specific types of
24 crimes that have been reserved for the death penalty in
25 Texas. As far as that list goes, does that, from your own

1 personal point of view, do you feel those are the
2 appropriate types of crimes that should be considered?

3 A. Yes.

4 Q. Okay. Now, when we talk about capital murder,
5 we usually think of an example involving the actual
6 triggerman. That's just natural. But capital murder, like
7 any other crime, might involve some accomplices, other
8 people that don't actually cause the death, but assist or
9 are helping to commit the crime. There might be several
10 people involved in the crime, some more involved than
11 others.

12 And the law says that if you are actively
13 participating, aiding, directing, or something like that in
14 the commission of a crime, you can be held responsible, even
15 if you are not the main perpetrator. And the same is true
16 in a capital murder. You can have one triggerman and you
17 might have other accomplices. We call them parties in
18 Texas, but I think we all, I grew up watching "Dragnet" and
19 "Perry Mason," and it was accomplices. They can be held
20 accountable, too.

21 But when it gets to the death penalty,
22 some people have a -- have a -- they would draw a line
23 there. They're for the death penalty, as long as it's
24 applied to people that actually cause the death, the
25 triggerman or the actual murderer. If someone is assisting

1 them that didn't actually cause the death, they may reserve
2 that crime for prison time. We have other jurors that tell
3 us, no, I think accomplices could receive the death penalty
4 and should be held responsible in certain situations,
5 depending on the facts of the case.

6 But people feel differently about that
7 and we just want to get your honest opinion on that. How do
8 you feel about accomplices being prosecuted in a death
9 penalty-type situation?

10 A. Well, I think you -- I think I would have to
11 know more of the circumstances. I think that, I'm from the
12 old school. Tell me who your friends are and I'll tell you
13 who you are.

14 Q. Okay.

15 A. I mean, I can't -- I feel that when you set
16 out to do something, that you better know who you are doing
17 it with. And the possibility that if there's a gun or he's
18 capable of having a gun, I mean, I think that you -- there's
19 certain things that you are aware of, you know, that -- so I
20 think that in that case, it would depend on, you know, on
21 the information I received.

22 Q. Okay. So it's just going to depend on the
23 facts of the case?

24 A. Right.

25 Q. Let me give you an example to illustrate the

1 law. There's two theories of law that a person can be
2 prosecuted as an accomplice. And we use this example often.
3 Mr. Wirsky and I, let's say we decide we want to rob the
4 bank down the street. And my plan calls for me to go in
5 with a gun, a loaded gun, and he's going to come in with a
6 big bag. I'm going to pull the gun out and threaten
7 everyone and get them to raise their hands. And then he's
8 going to go through and take all the money out of their cash
9 drawers.

10 During the course of that robbery, I
11 decide to shoot one of the tellers intentionally. Maybe I
12 don't like the way they looked at me, I don't think they're
13 cooperating fast enough, maybe he said they're going for an
14 alarm, but I shoot them intentionally. And then we flee the
15 bank, but we're caught soon afterwards.

16 Now, obviously I could be prosecuted for
17 capital murder. I could receive the death penalty from a
18 jury, because I'm the actual triggerman. The law says that
19 he could, too, if the jury believes, or one theory is, he's
20 actively involved in the crime. He's aiding and directing,
21 helping to commit the crime. He could be held responsible,
22 even though he didn't cause the death.

23 Or, under the theory of conspiracy, if we
24 conspire to commit one crime, in this case if we agreed to
25 commit bank robbery, and during the course of committing

1 that bank robbery, one of us commits another felony to
2 further the conspiracy, in this case it would be me shooting
3 someone, then everyone involved could be held responsible,
4 including him, even though he didn't have the intent. He
5 doesn't even have to have the intent someone would die, if
6 the facts show and the jury believes that he should have
7 anticipated a life could be taken from the facts. Kind of
8 like, I think, some of things you were saying. Show me who
9 your friends are and I'll show you who you are. And their
10 involvement, what they knew about the crime.

11 If the jury believes from all the facts
12 that they should have anticipated, even though maybe he
13 didn't intend anyone to die, he can be found guilty. And to
14 get the death penalty, the jury has to believe not only that
15 he should have anticipated, but he did anticipate. But
16 those are the two theories.

17 And, like I say, some jurors would take
18 the death penalty off the table, if it were a nontriggerman.
19 Other jurors tell us, no, I think it is fair to prosecute
20 someone for the death penalty, even if they're a
21 nontriggerman or an accomplice, and ultimately that they
22 receive the death penalty. It just depends on their
23 involvement and the facts.

24 I feel kind of from what you told me that
25 you are in agreement with that area of the law, that

1 accomplices can be prosecuted and ultimately could receive
2 the death penalty, depending on the facts?

3 A. Yes.

4 Q. Okay. Let's talk about these Special Issues.
5 You don't get to a death penalty unless first you find the
6 defendant guilty and then the second phase of the trial you
7 get some Special Issues. The second phase of the trial you
8 get to hear additional evidence and at the close of that
9 evidence you get these questions. And we'll go over these
10 in more detail in a moment.

11 But basically the questions ask this.
12 Would the defendant be a continuing danger to society? Did
13 he intend the person to die or did he anticipate that a
14 person would die? And is there sufficient mitigating
15 evidence that a life sentence should be imposed rather than
16 a death sentence?

17 If the questions are answered yes, yes,
18 and no, the Judge wouldn't have any discretion. He would
19 sentence the defendant to death. If they're answered any
20 other way, again, he wouldn't have any discretion. He would
21 sentence the defendant to life. But those are the only two
22 possible outcomes, once a defendant is found guilty. It's a
23 death or life sentence.

24 Are you familiar with the method of
25 execution in Texas?

1 A. Um, I think so. I'm not --

2 Q. Lethal injection.

3 A. Uh-huh.

4 Q. Yes.

5 A. Yes.

6 Q. Since the death penalty was reinstituted, that
7 has been the method of execution. And the procedures are
8 the same in each case. Since you've lived in Texas a number
9 of years, you probably are aware that Texas actually does
10 carry out executions.

11 A. Uh-huh. Yes.

12 Q. They're frequently in the news, have been in
13 the newspaper, on TV, depending on the person or what is
14 going on. But you often will read about these, especially
15 after they've been carried out. Some states have the death
16 penalty on the books and they never -- they never prosecute
17 it or never carry it out. Texas actually does. In fact,
18 Texas leads the nation in executions.

19 The procedures are the same in each case.
20 If this defendant were found guilty and the questions were
21 answered in a way in which he would be sentenced to death,
22 he would be placed on death row. He would wait there a
23 number of years, and at some point in time the Judge would
24 give him a date of execution. The day prior to that date,
25 he would be moved from death row into downtown Huntsville.

1 There's a prison there that has an old
2 clock on it, and often it's shown on the news by protestors
3 out there or a spokesperson out front. And that's where
4 executions take place. On the date of his execution, the
5 prison allows him to have time with family or friends or a
6 minister, a last meal. But at 6:00 p.m. by law the
7 execution will take place. He would be taken down the
8 corridor, placed in that room that's often shown on TV,
9 where there is a gurney, put on the gurney, secured there by
10 leather straps.

11 Needles would be placed in his arm.
12 Tubes go to another room where the executioner sits. At
13 that point in time witnesses are brought in. They have
14 witnesses for the victim's family as well as the defendant's
15 in different rooms. He's allowed then to give a last
16 statement, and that's often reported, the details are, in
17 the news. He may ask for forgiveness, he may claim his
18 innocence, he may be very defiant.

19 At the end of that statement the warden
20 simply signals the executioner, who then injects lethal
21 chemicals which immediately collapse the lungs, shut the
22 heart down. He lapses into a coma and within about 15
23 seconds will be dead. Those are the procedures in each
24 case. They're reported like that.

25 And, quite frankly, our goal in this case

1 is to have the defendant executed. We believe we have the
2 type and quality of evidence to convince a jury of his
3 guilt, and that those questions should be answered in such a
4 way that result in the execution. We bring a lot of people
5 down here, we have them fill out these questionnaires, we
6 interview them about their feelings on the death penalty,
7 and everyone feels a little bit different.

8 Some people are opposed to the death
9 penalty on religious or moral grounds and could not serve in
10 good conscience. Some people are too, almost too adamantly,
11 for the death penalty and couldn't be fair. We have other
12 people that are for it and could serve and could make these
13 decisions. And we have some people that, even though
14 they're for it philosophically, when it gets down to it,
15 it's too much of a burden on them. It would weigh too much
16 on their conscience to make a life and death decision.

17 We can't preview the facts for you and
18 you certainly haven't been in this situation before. But
19 all's we can ask you is to reflect upon yourself. And as
20 best you know yourself, do you feel you are the type of
21 person that could sit on a jury of this nature and make
22 these decisions, if the State proves it to you, take pen in
23 hand and answer those questions in a way, knowing the
24 defendant would be executed some day?

25 A. Yes.

1 Q. Okay. Why do you feel you're that type of
2 person? What do you know about yourself that you feel you
3 could make that decision?

4 A. Um, I guess I have some, you know, real, I
5 have some views about society and I have certain -- I'm very
6 conservative. I try to familiarize myself with things, you
7 know, that I believe in, like, you know, going to school
8 just to learn more about the Bible and things like that.
9 But I'm not -- but I don't know how to answer that.

10 I just think I can listen. I think I
11 can. I think I have good discernment.

12 Q. Okay.

13 A. I think I have a good conscience. I think I
14 was brought up that way and I think I've lived that way all
15 my life. And I think I -- I may not like certain things,
16 but I'm able to obey them, if it's necessary to be obeyed.
17 And I just feel like I have a good, a good discernment.

18 Q. All right. Now, we ask in the questionnaire
19 and some -- and we ask again when you get down here about
20 whether you have heard anything about this case. We can't
21 get into the facts, but we can tell you basically that the
22 crime occurred December 24th of 2000 at the Oshman's on
23 Christmas Eve, involving the murder of a police officer by
24 the name of Aubrey Hawkins in Irving, Texas.

25 Do you recall seeing any of these, the

1 news coverage? It got a lot of publicity back when it
2 occurred, I know. Do you remember seeing any of that on TV
3 or radio or newspaper?

4 A. Yes, I did. But I didn't remember. I
5 remembered the group that had escaped from prison and I
6 remember Hawkins. I remember that name. But I didn't
7 really follow it closely in the paper.

8 Q. Okay. You just remember it when it occurred?
9 Do you remember any details you read about how it occurred
10 or anything like that?

11 A. No, no, I don't remember that.

12 Q. Did you follow it any after the -- any court
13 proceedings or anything like that?

14 A. No, I have not.

15 Q. Okay. Just because you have seen something on
16 TV, doesn't make you ineligible to be a juror. The test or
17 the rule is this. Jurors have to be able just to make their
18 decisions on what they see or hear in the courtroom.
19 Obviously, you can't let an article you've read influence
20 you or make your decision, because the best evidence is
21 going to come from the actual witnesses here at the trial.

22 We can't ask you to forget about what you
23 have seen or read, but we have to be able -- or you have to
24 be able to tell the Court, I'm not going to let that
25 influence me. I'll just make my decision based on the

1 evidence that is produced here in the courtroom. Do you
2 feel you could do that?

3 A. Yes.

4 Q. Okay. Let's talk about these Special Issues
5 for a moment. I want to go over them with you -- with them
6 with you one at a time. So if you would just read Special
7 Issue No. 1 to yourself.

8 A. (Prospective juror complies.)

9 Q. That question under the law starts out with a
10 no answer. You don't get to it unless you have found the
11 defendant guilty. It starts out with a no answer and the
12 State must prove to you beyond a reasonable doubt that it
13 should be answered yes. You may hear additional evidence in
14 the punishment stage. But you see how that question asks
15 the jurors to make a prediction about how the defendant will
16 behave in the future?

17 A. Yes.

18 Q. Do you feel comfortable in making that
19 prediction or answering that question, if you're given
20 enough information?

21 A. If I was given enough information, I could.

22 Q. What types of things would you want to know
23 about the defendant before you answered that question?

24 A. Well, I probably do know that he was in
25 prison. I'd probably want to know the reason he was there,

1 although it doesn't necessarily lend itself to the fact that
2 he did or didn't do this. I guess I would want to listen to
3 some psychologist or psychiatrist reports. Witnesses would
4 be really important. How he was acting, I mean, probably
5 the circumstances which I didn't follow, you know, of what
6 he might have done or didn't do when he -- when he did get
7 out of prison, or how, what the circumstances were of his,
8 of his getting out, you know, what he did.

9 Q. Okay. Now, you don't get to this unless
10 you've already found him guilty. So you would have heard
11 about the crime itself at that point in time. In fact, you
12 would have determined that he's guilty beyond a reasonable
13 doubt of capital murder. And you get to review that same
14 evidence, the role in the crime, how the crime occurred,
15 obviously, when you're looking at that question.

16 Also, a person's background that you
17 mentioned gets to come in at that point in time. If they've
18 had a previous crime, the background of that crime. The
19 actual witnesses can come forward and you can hear them
20 describe that crime, the type of punishment he received and,
21 also, hear good things, good things, bad things, as far as
22 character goes. Any extraneous offenses that occurred, any
23 events that happened surrounding the crime, after the crime,
24 that sort of thing, also come into play.

25 And you need to consider all of that in

1 this decision. And then you make your determination. We
2 have to prove that there's a probability that the defendant
3 would commit criminal acts of violence. What does
4 "probability" mean to you?

5 A. I guess how he reacts to questions or certain
6 tests that he might have had. You know, I'm not even sure
7 what I mean by that. But it would probably be what he, if
8 he testifies, what he says, how he seems to appear based on
9 a psychological examination.

10 Q. Okay. When we talk about probability that he
11 would commit criminal acts of violence, what does that mean
12 to you, if there's a probability he would commit that? Is
13 there a percentage you'd give to that, greater than 50
14 percent, less than 50 percent, in terms of that question?

15 A. Maybe 50 percent.

16 Q. Okay. The only direction I can give you is,
17 obviously, we don't have to prove a certainty he would be a
18 continuing danger to society. But, obviously, we have to
19 prove that it's more than a possibility.

20 A. Uh-huh.

21 Q. And a lot of people tell us more likely than
22 not, that sort of thing. Are you comfortable with that?

23 A. Say that again.

24 Q. That probability would be more likely than not
25 he would commit criminal acts of violence.

1 A. Do you mean I would already make a --

2 Q. In terms of that question. When we say
3 probability he would commit criminal acts of violence, are
4 you comfortable with it's more likely than not, greater than
5 50 percent chance, let's say, or so, that that's what the
6 State has to prove to you, that he would commit criminal
7 acts of violence in the future?

8 A. They wouldn't necessarily have to prove that
9 he would. I guess I would go on some of his past behavior.

10 Q. Right. You can do that.

11 A. Or what he did during the -- what the crime he
12 committed, what his part in it was, you know.

13 Q. You can use all of that in your determination.
14 Past history, his role in the crime, what, how he acted
15 afterwards, all of that could come into play. One of the
16 things we have to prove to you is that he would commit
17 criminal acts of violence. When you see the words "criminal
18 acts of violence," what does that mean to you?

19 A. Murder, I guess just being violent enough that
20 bringing someone to near death, you know, by beating them or
21 intimidating them to such a degree that they can't function,
22 you know.

23 Q. Okay. So some type of threat or assault or
24 violence to another human being?

25 A. Yes.

1 Q. Okay. And we have to prove he would
2 constitute a continuing threat to society. What does
3 "society" mean to you?

4 A. It's all of us. It's you and I and other
5 people that maybe I wouldn't associate with, but just people
6 in general, you know, just, society just means all of us.

7 Q. Okay. Could it also include people in the
8 prison system?

9 A. Yes.

10 Q. All right. Now, let me ask you this. You
11 said some interesting stuff in your questionnaire about your
12 -- you've had some pretty strong views about a life sentence
13 and true life sentences and kind of, liberal views, you
14 think, sometimes this justice system has had which has
15 affected your own viewpoints.

16 In a capital murder case, once you get to
17 this point, he gets an automatic life sentence. And then if
18 these questions are answered in a way, it's going to be a
19 death penalty. But at the very bottom line, he would be
20 doing this life sentence. And then these questions call for
21 the juries to determine if you think he's a continuing
22 danger and he anticipated a life would be taken.

23 The law says this. The Judge would give
24 you this instruction. As far as capital murder goes, a
25 capital life sentence means they have to serve forty

1 calendar years before they become eligible for parole. We
2 don't have the life without parole, but you have to serve
3 these forty calendar years. And then that would
4 automatically make him eligible.

5 But he would also instruct you that this,
6 give you this instruction, that you can't consider that or
7 any of the parole laws. You just have to be able to
8 consider a life sentence a life sentence. You can't
9 consider that a person will maybe come up for parole or that
10 sort of thing in your deliberations. And some people
11 sometimes have a problem with that because of what they've
12 read or they know about the parole laws.

13 And you had mentioned that, so I wanted
14 to take a little extra time with you and talk to you about
15 that, because you knew, it seems like you may have read or
16 know something about the system and made some comments about
17 that.

18 Do you think you could follow that rule
19 of law, as far as the Court's instruction goes, about the
20 life sentence and you have to consider it a life sentence?

21 A. I think I could follow it.

22 Q. Okay. Also, I want to make sure of this.

23 Once you've found him guilty beyond a reasonable doubt, we
24 get to these questions. Do you believe you could answer the
25 questions in a way which would give a person a life sentence

1 or do you feel that if it's a situation where he got the
2 death penalty, that it's always going to be a death penalty
3 situation, knowing how you feel about some of the parole
4 laws, or at least how you feel about the judicial system?

5 A. I guess if the Judge and my -- you know, if
6 they gave me, I have to believe that if a person is put in
7 prison for life, be that 40 years or whatever, that they
8 will remain there, that their only chance of getting out
9 would be parole at the end of that period of time. Okay? I
10 would believe that, because that's the law. So I guess I
11 would have to believe it. You know, and --

12 Q. Okay. So you think you can follow that
13 instruction?

14 A. Yes.

15 Q. Okay. I just want to make sure of that before
16 I went any further with you, because I know you had
17 mentioned that in your questionnaire. Now also, with this
18 question you mentioned psychologists or psychiatrists.
19 Sometimes we do hear from those type of experts who can then
20 give you opinions about whether you think someone is a
21 future danger or not. Sometimes the defense calls them to
22 give -- so they can give their opinions. Once in a while
23 the State does, too. Do you feel that those type of experts
24 would be important to you?

25 A. They'd be important, but I'd listen very

1 carefully, because I don't always -- sometimes I think
2 personal opinion gets in and, of course, that's really not a
3 science. It's kind of an art, you know.

4 Q. Right.

5 A. So I would listen to it, of course, because
6 they are an authority. But I would -- and I would weigh
7 that in and I would trust that you would bring people in
8 that knew what they were talking about. But I think I
9 could. I think I could see beyond someone trying to
10 manipulate certain things. And I don't know what those
11 things are.

12 Q. Okay. This question starts out with a no
13 answer. We have to prove it should be answered yes. And
14 the fact that he's been found guilty of capital murder
15 doesn't mean it would be an automatic yes. You'd have to,
16 as a juror, wait and listen to all the evidence and then
17 make your decision and require the State to prove to you
18 beyond a reasonable doubt it should be answered yes. Do you
19 feel you could do that?

20 A. Yes.

21 Q. Okay. Now let's look at the second Special
22 Issue. That has to do with the accomplice situation we
23 talked about earlier. If you'll take a moment and read that
24 to yourself.

25 A. (Prospective juror complies.)

1 Q. That question, you remember we talked in the
2 guilt/innocence stage that the State, if it's an accomplice
3 -- and the reason I'm spending all this time is I can't
4 preview the facts, but that's the theory of law we're
5 prosecuting this case under, is that the defendant is an
6 accomplice in this case, not the actual triggerman. So
7 that's why this question is important.

8 The first part of the question asks
9 whether the defendant actually caused the death of the
10 deceased. In cases where you believe he's the actual
11 triggerman, the question is answered at that point in time.
12 But if it's an accomplice situation, you go to the second
13 part and it asks, if they didn't actually cause the death of
14 the deceased, but they intended to kill the deceased or
15 another. So if the evidence shows you they had that
16 intention that someone would die or they anticipated that a
17 human life would be taken, to get to a guilty we have to
18 prove he should have anticipated.

19 You talked about the crime, the facts, if
20 they, you know, what they should have known could happen.
21 And here we have to prove that he did anticipate. And
22 oftentimes it's the same evidence. It also might be
23 additional evidence you hear from their background, too,
24 that could help you aid in that. And that's what we have to
25 prove to you.

1 So if a situation involves an accomplice,
2 we can't open his mind up and show you his intent. All's we
3 can do is put on all the relative evidence and as a jury you
4 can use your common sense and you can draw reasonable
5 deductions and determine a person's intent from their
6 actions and their involvement in the crime. Do you feel you
7 could do that as a juror?

8 A. Yes.

9 Q. Okay. Just kind of a common sense approach.
10 That question starts out with a no answer and, again, the
11 State has to prove to you that it should be answered yes.
12 The fact that you found the defendant guilty, found that
13 he's a continuing danger to society, doesn't mean you would
14 automatically answer that question yes. You just have to
15 relook at that issue from its own point of view and
16 determine if the State has proven it to you. Do you feel
17 you could do that?

18 A. Yes.

19 Q. The last Special Issue is the mitigation
20 question. You don't get to that unless you have found the
21 defendant guilty, found that he's a continuing danger, found
22 that he anticipated that a life would be taken. And then it
23 lets you look at all the evidence. And if you'll take a
24 moment to read that to yourself.

25 A. (Prospective juror complies.)

1 Q. I always like to tell jurors that we didn't
2 write these questions. Someone in the Legislature did.
3 They kind of run on a little bit.

4 But it's kind of a catchall question.
5 You see that it allows the jurors to look at a person's
6 background, their role in the crime, everything involved.
7 And then if they believe a life sentence should be imposed,
8 they could answer the question that way. If they don't
9 think there's sufficient mitigating evidence, then they
10 could make it a no answer and then the person would receive
11 the death penalty.

12 But it's kind of a safety valve. It lets
13 you look at all the evidence again and decide if you think
14 it's appropriate to give a life sentence. You have to base
15 your decision based on some evidence, obviously. What
16 mitigating evidence is, is up to you and the other jurors.
17 You're not required under law to tell us what mitigating
18 evidence is, just that you'd keep your mind open to it and
19 give it sufficient weight. And if you think it reaches that
20 level, you could answer it that way.

21 As you sit there today, does anything
22 come to mind which you might view as potentially mitigating
23 evidence?

24 A. Um, I guess I didn't follow you with the last
25 part of your sentence, your question.

1 Q. Just sitting there today -- and I was just,
2 again, trying to get your gut reaction. Does anything come
3 to mind as -- can you think of anything that you might view
4 as potentially mitigating evidence?

5 A. I guess, you know, his -- his part in the
6 crime and what -- maybe even his part in the group, you
7 know, once they became a group.

8 Q. Uh-huh. What would be important to you about
9 that?

10 A. Well, you know, was he the leader? Was he the
11 one who called all the shots? Was he the one that decided,
12 you know, we're going to go in here? He probably, he may
13 not have -- I don't know if I'm going in the right
14 direction. He may not have pulled the trigger, but he may
15 have been the leader or the one who enabled them to get as
16 far as they did or go to that place that evening, that might
17 be --

18 Q. As opposed to a follower or something like
19 that?

20 A. Yeah, that might, that might be something that
21 --

22 Q. I take it from your comments, being the
23 leader, though, wouldn't be something you'd view as
24 mitigating?

25 A. No, no. No, right, I was answering it the

1 opposite way.

2 Q. But no, I understood what you meant. So
3 someone that a follower might be, that might be what you
4 might view as potentially mitigating?

5 A. Yes.

6 Q. Okay. Now, another area people bring up
7 sometimes is how a person was raised. Maybe they -- maybe
8 they grew up in a poor household or a broken home or maybe
9 they were physically or mentally abused. Some people view
10 that as potentially mitigating, if it were severe. Other
11 jurors tell us, no, I'd feel bad for them, but, you know,
12 you've got to make your decisions in life as an adult. You
13 have to be held accountable. You can't use that as an
14 excuse.

15 Jurors feel differently about that type
16 of background information, but oftentimes it comes up in
17 these cases. How do you feel about that type of evidence?

18 A. I'm not quite sure what we should do with that
19 type of evidence. I mean, I think that it might enter into
20 it, but I'm not quite sure -- I mean, that seems to be the
21 direction we take in everything. And I'm not quite sure
22 what we're trying to do. It seems like we want to blame
23 everybody, but the person, their parents. And maybe if
24 that's the case these days, then maybe we need to hold
25 parents and guardians responsible and maybe they'll take it

1 more seriously.

2 You know, if they know that, hey, this
3 man's going to, you know, he's forty years old and kills
4 somebody, and you're going to be held responsible if you
5 don't treat him, you know, well -- and I guess in the
6 society, I can't imagine a person not being able to go to
7 school, not being able to get some sort of help, you know.
8 And so, if that's the direction we're going in, then, you
9 know, I guess you need to consider, because that seems to be
10 the direction we're going in. So you need to consider his
11 background, his childhood, and the way he was raised.

12 Q. Okay. Again, you might hear from experts on
13 this question. You know, we have mitigation experts that
14 offer their opinions about why a person acts the way they do
15 because of the way they were raised or their circumstances,
16 that sort of thing. Jurors feel differently about that.

17 You have jurors that really want to hear
18 that type of evidence. Other jurors think, you know, you
19 could probably find an expert to say just about anything, if
20 you look hard enough. Other jurors tell us, it would just
21 be another piece of the puzzle for me. It wouldn't really
22 hold one way or the other as far as weight goes.

23 Do you feel -- do you have any opinions
24 about that on those type of experts as of this particular
25 issue, the mitigation issue?

1 A. I think it would be another piece of the
2 puzzle, but I wouldn't, you know, it wouldn't necessarily
3 hold more ground. It might hold a little less ground than
4 some of the actual facts.

5 Q. Okay. Now, let me talk to you a little bit
6 about some of the rules that apply, see if you can follow
7 these rules. These are rules you'll probably be familiar
8 with.

9 One is the presumption of innocence.
10 When a defendant starts out in a criminal case, he has to be
11 presumed to be innocent by the jurors. The fact that he's
12 been arrested or indicted or that we're even going through
13 this process, is no evidence of his guilt. The evidence
14 comes from actually putting on the witnesses.

15 Could you follow that rule of law and
16 give the defendant that presumption of innocence?

17 A. Yes.

18 Q. Okay. That burden of proof is on the State.
19 It never leaves this table. We have to prove the case
20 beyond a reasonable doubt and you can't require the defense
21 to prove his innocence. The burden of proof never shifts
22 over to that side. Do you feel you could follow that rule
23 of law?

24 A. Yes.

25 Q. The burden of proof goes to each and every

1 element of the indictment. We have to prove every part of
2 it. If we fail on even one part, if you have a reasonable
3 doubt on one element of the indictment, then you're
4 obligated to find the defendant not guilty.

5 One of the elements, obviously, will be
6 the identity. If we -- if you had a reasonable doubt about
7 who committed the crime, obviously, you're going to find him
8 not guilty. But just as important under the law is the
9 element of Dallas County. We have to prove where this crime
10 occurred. If, maybe the facts showed it happened near the
11 borderline and you believe really it happened in Tarrant
12 County, and if that actually occurred and you had a
13 reasonable doubt about Dallas County, you would have to find
14 him not guilty. Just as you would if you had a reasonable
15 doubt about his identity.

16 And some people view that as a
17 technicality, but under the law it's not. It's viewed just
18 the same. You may not like it, but the jurors have to act
19 as kind of neutral referees. You can't give us one of the
20 elements as a technicality. Would you be able to follow
21 that rule of law and if you had a reasonable doubt, even
22 about something as what some people view as insignificant or
23 a technicality, but it's not under the law, as Dallas
24 County, could you find the defendant not guilty?

25 A. On something that technical? I don't know.

1 It would depend upon the technicality. But if it was that
2 it happened in Tarrant County versus Dallas County, I don't
3 see any relationship to what happened. I just think then
4 we'll move it to the Tarrant County Court and we'll, you
5 know, find out why it was placed in this court. And if
6 somebody didn't do their paperwork right, we would say,
7 okay, you're going to be fired or something like that. But
8 I don't see that I --

9 Q. Well, I don't anticipate any of that to
10 happen. And obviously if it did, you could have us fired,
11 because that would be pretty poor preparation on our part.
12 But under the law, it is viewed just as important.

13 And you would have to be able to tell the
14 Court, you know -- I say I don't anticipate it would happen,
15 but it's a real test in that you'd have to be able to tell
16 the Court, I could find someone not guilty, if they didn't
17 prove any, just one of the elements, and one of the elements
18 is Dallas County. And the Court will instruct you, you'd
19 have to be able to do that.

20 And we're just asking you what your
21 honest opinion is, which you've given us so far, if you
22 could follow that rule?

23 A. I would be very upset with you, but I guess I
24 -- I guess if that's the law. But it would -- that would be
25 -- it would just be very hard for me to do, especially in a

1 capital murder case. It would be very hard for me to, you
2 know, if it was as technical, as minute, as that, then --

3 Q. Well, let me give you one more test, just to
4 see. Here's another example. We have to prove the manner
5 and means how the crime occurred. We may have alleged that
6 the person was shot. That's how he died. And we have to
7 prove that once we write it in the indictment. The evidence
8 might show that he was actually shot and stabbed. In fact,
9 after the medical examiner testified, he may say actually
10 what this man died of were stab wounds. The shot wound was
11 kind of superficial.

12 Again, that would be very poor
13 preparation on our point of view. We probably should have
14 said he was shot and stabbed or stabbed to death, is what we
15 should have put, but we didn't. Again, you wouldn't have a
16 doubt about who committed the crime. Maybe not where they
17 committed the crime. We've proven to you beyond all doubt
18 maybe that the defendant committed it. But you'd have a
19 reasonable doubt about how it happened, and that's because
20 the indictment says shooting and you thought it was
21 stabbing.

22 That's another technicality, but, again,
23 the law says if you have a reasonable doubt on any of it,
24 you have to find the defendant not guilty. Might be tough,
25 but you'd have to do that. That's another tough test we

1 give jurors to see if they could really follow that rule of
2 law, just like the county.

3 THE COURT: Let me add one little thing.
4 The prosecutor is the one who writes the indictment and they
5 present that to the Grand Jury. So they draft the
6 indictment. That's so they're bound by what they draft.
7 Does that help you somewhat?

8 PROSPECTIVE JUROR: Yes.

9 THE COURT: Okay.

10 Q. (By Mr. Shook) So it would be our fault,
11 obviously. We have to prove what we allege. Again, you can
12 have us fired. And some jurors, quite frankly, couldn't do
13 that. They just say, no, Judge, I'm not doing that. Other
14 jurors tell us, yeah, I could do it. And we just want your
15 honest opinion on that issue.

16 A. I don't -- I, um, it would have to be -- it
17 would have to be more -- well, I don't know that I could do
18 that. I don't know that I could.

19 Q. You're having some problems with it, I can
20 see.

21 A. Yeah. I just don't know if I could.

22 MR. SHOOK: Judge, I think the juror has
23 been as honest as she can with this and that's all the
24 questions I have.

25 PROSPECTIVE JUROR: Okay.

1 MS. BUSBEE: The parties have reached an
2 agreement on this juror.

3 THE COURT: Ma'am, we appreciate your
4 time and service today and don't think that you have caused
5 a problem, because you haven't. You have been honest. And
6 that's all we require. The parties have agreed to excuse
7 you from this case. You will not serve, okay? Thank you so
8 much.

9 [Prospective juror out]

10 (Recess)

11 THE COURT: Mr. Smith.

12 [Prospective juror in]

13 THE COURT: Good morning.

14 PROSPECTIVE JUROR: Good morning.

15 THE COURT: Welcome to the 283rd. We
16 have juror No. 2516, Michael G. Smith. Sorry for the delay,
17 Mr. Smith. We take them three in the morning and three in
18 the afternoon and you were the third one to check in this
19 morning, so that's the way it goes.

20 PROSPECTIVE JUROR: It's all right.

21 THE COURT: We have to balance the
22 fifteen people waiting, versus a couple of people waiting.
23 So that's -- I don't have a better way to do it, so I'm
24 sorry for the delay.

25 PROSPECTIVE JUROR: I understand.

1 THE COURT: Obviously, you've had enough
2 time to read the guide I provided for you a couple times
3 through. I also provided your questionnaire that you filled
4 out in May. Hopefully you looked at that and began to think
5 about some of the issues the attorneys will discuss with you
6 this morning.

7 I certainly don't expect you to
8 understand everything at this point. They will visit with
9 you and help you understand how the law relates to the
10 issues before the Court. There are no wrong answers, just
11 truthful ones. The only question I have for you at this
12 time before we begin is will you be able to serve this Court
13 for two weeks beginning on November 10th?

14 PROSPECTIVE JUROR: Yes.

15 THE COURT: Thank you, sir. Mr. Shook,
16 would you like to inquire?

17 MR. SHOOK: Yes, Judge.

18 MICHAEL SMITH,
19 having been duly sworn, was examined and testified as
20 follows:

21 DIRECT EXAMINATION

22 BY MR. SHOOK:

23 Q. Mr. Smith, my name is Toby Shook. I'm going
24 to speak to you this morning on behalf of the State. And,
25 as the Judge said, there aren't any right or wrong answers.

1 We just want your honest opinions. You've been very honest
2 on your questionnaire, so I don't anticipate a problem with
3 that.

4 Feel free to ask us questions at any
5 time. And what I'll do is go over a few things in your
6 questionnaire and then talk to you about how you feel about
7 capital murder, the death penalty, and some of the rules and
8 laws that apply.

9 I see from your questionnaire that you
10 have been at Southwest Airlines for, what, about 13 years or
11 longer now?

12 A. Yes.

13 Q. And you're a technical writer there?

14 A. Yes.

15 Q. What exactly does a technical writer do for
16 Southwest?

17 A. In my capacity I maintain the flight
18 attendants' manual and issue communications to them from the
19 executives.

20 Q. Okay. And you went to the University of
21 Texas; is that right?

22 A. Yes.

23 Q. Where you were a journalism major?

24 A. Yes.

25 Q. How is it that you got into the field that

1 you're in now from the journalism major? Tell us that.

2 A. I had returned to Dallas from Washington to
3 start work on a new publication, but it never got off the
4 ground. So I took a temporary job at Southwest and liked
5 the environment and stayed there.

6 Q. Okay. I see that you had been involved -- we
7 always ask if you've ever been involved in any political
8 campaigns, and I believe you worked in the campaign for the
9 railroad commissioner and maybe some others?

10 A. Yes.

11 Q. What did you do in those campaigns?

12 A. I was -- I worked a phone bank for Governor
13 Clements. That kind of low level work, yard sign assembly.

14 Q. Okay. Were you a student then?

15 A. I was a student in my early -- yes, early
16 endeavors.

17 Q. Okay. And I'm just curious. From reading
18 your questionnaire, you appear to be probably pretty, I
19 would say, conservative, if I were to label someone. I
20 don't like labeling people. But you have a conservative
21 background on some of your views. But then I met some other
22 journalist majors from the University of Texas and they were
23 at the opposite end.

24 How was that experience out at UT?

25 Because I know you have, obviously, all sorts of people in

1 journalism, but usually they're not as conservative. Did
2 that -- were you as conservative then or did that cause some
3 debates when you were down there at UT, or --

4 A. Yes.

5 Q. Okay.

6 A. I didn't fit in too well at the student paper.

7 Q. I was wondering. That's one thing that struck
8 me when I read your questionnaire. I had one juror who was
9 very conservative once and he worked at Half Price Books.
10 And I like going to Half Price Books. But when you look at
11 the people that work in Half Price Books, they're usually
12 what, if I were to guess, wouldn't be considered
13 conservative. And he said, yes, he was the exception to the
14 rule there.

15 But, so, I had similar thoughts when I
16 read what your major was down there. Also, you had a high
17 school friend that was a victim of a -- it looked like a
18 murder case down in Houston that might have had some
19 notoriety; is that right? Back in 1983?

20 A. Yes, I think probably the term "acquaintance"
21 would be more appropriate. We knew of each other and we had
22 met. We hadn't, for example, gone to lunch with each other
23 or met each other's families.

24 Q. Okay. Anything about that experience which
25 might cause you to be biased in any way? It was 20 years

1 ago.

2 A. No, it was just my first exposure to a
3 particularly brutal crime of someone I knew.

4 Q. Okay. Then another interesting aspect from
5 your questionnaire was your -- you have a, is it a cousin
6 that's an assistant DA up in Colorado?

7 A. Yes.

8 Q. Who may have participated in the extradition
9 process in these particular cases?

10 A. That's what my father told me.

11 Q. But you haven't actually discussed that with
12 him at all?

13 A. No.

14 Q. Okay. I take it that wouldn't be a problem
15 for you at all?

16 A. No.

17 Q. All right. Let me talk to you how you feel
18 about the death penalty from your personal point of view.
19 From your questionnaire you said you were in favor of it as
20 a law. And I'd like you to just kind of expound on that and
21 tell us why you favor it, maybe the purpose you feel it
22 serves.

23 A. For the crime of capital murder, it is
24 proportional. It's -- I could expound on that, I guess. It
25 depends on how --

1 Q. Do you feel, then, it's just a just sentence
2 for certain crimes, the type of crime that, the victim, and
3 that sort of thing?

4 A. Yes. The word "just" in its whole meaning, I
5 think, applies in this case, applies to that crime and the
6 punishment.

7 Q. Your viewpoints on the death penalty, did you
8 develop those as you grew up? Anything you've read in
9 particular or just the way you were raised, do you think?

10 A. I inherited a lot of knowledge and
11 understanding from my family. I questioned that belief and
12 over time and through learning, I found it to be valid.

13 Q. Okay. It looks like from reading your
14 questionnaire that you've had some serious discussions about
15 it, maybe philosophical discussions. You had mentioned that
16 you had recently had a discussion with a friend about it,
17 and his views had changed. I think ultimately you said that
18 you agreed that it's still just in the big picture that its
19 administration is somewhat cumbersome.

20 Tell us a little bit more about that
21 discussion and what your feelings were.

22 A. This was a friend I know and respect and have
23 for many years. And it surprised me when he asked me what
24 do we get out of the death penalty, talking politically
25 speaking. And I said, well, I'm not really sure what you

1 mean. And he said, well, it's -- it takes so many resources
2 and time to make it happen and perhaps it should. Is it
3 worth it? Is there not something else we could do with
4 those convicted of capital murder that would be -- that
5 would free up resources for other things that may need our
6 attention more? And I found that to be a rather persuasive
7 viewpoint. However, I acknowledge that that is a question
8 for legislatures and for society to decide, not for juries.

9 Q. Okay. From your own personal point of view,
10 let me ask you this. What types of crimes do you feel
11 should there be an option for the death penalty?

12 A. I agree with the law as I understand it, which
13 is capital murder, premeditated murder, murder in the
14 commission of another crime, murder of a peace officer. I
15 think that about covers it. I've thought those over in my
16 mind and they seem to all be valid.

17 Q. Okay. Would you from your own personal --
18 let's say we can make you Governor for a day, a Governor who
19 has a little more power than a Governor of Texas has. You
20 could make up whatever laws you wanted on the books. If it
21 were up to you, then, would you have the -- would you keep
22 the death penalty on the books or would you have a death
23 penalty statute?

24 A. I think I would keep it.

25 Q. Okay. Would you have a similar scheme as at

1 least to the type of offenses considered under the death
2 penalty statute as it now exists?

3 A. I wouldn't change that.

4 Q. Okay. You mentioned the process, that it
5 takes so long, and am I right in assuming you are talking
6 about the long appellate procedures and that sort of thing?

7 A. Yes, the over-all. As I understand, just from
8 what little I know, sometimes it can take a decade or more.

9 Q. Right. Actually, in recent years they've
10 changed the law, somewhat, to speed that process up. And
11 actually it seems to have worked. Now, older cases still
12 take longer and some cases may take longer than others,
13 depending on the particular appellate issues.

14 But there have been, there was a
15 significant law change just a few years ago and we have seen
16 an increase in the speeding up of the appellate process.
17 But as far as ultimately your discussions with your friend
18 and your thoughts on the death penalty, you still feel from
19 your own personal point of view that we should have the
20 death penalty and it's a law that should be enforced?

21 A. Yes, I do.

22 Q. Okay. Let me ask you this. You've got a good
23 grasp on the types of crimes that should be considered. And
24 when we think of a capital murder or a death penalty
25 situation, we always think of fact situations. You know, if

1 you think of murder during a robbery, we think of a guy that
2 goes into a 7-Eleven, let's say, and shoots the clerk during
3 a robbery or something like that. And it's natural to think
4 of the actual triggerman.

5 But capital murder, like other crimes,
6 can have several people commit the crime. You may have only
7 one triggerman. You may have other individuals who assist
8 in committing that crime. And the law says that under any
9 crime, these accomplices can be held accountable, can be
10 found guilty of that same crime as the triggerman. They can
11 also receive the same punishment, depending on the facts.
12 And the same is true in a death penalty situation.

13 People feel differently about that from
14 their own personal point of view. Some people believe in
15 the death penalty, but if it were up to them, they would
16 reserve it just for the triggerman. They feel it's only
17 just for that. If it were an accomplice involved, they
18 might reserve a long prison sentence for them, but they
19 don't feel it's fair to administer the death penalty to
20 them. Other jurors feel that an accomplice can be found
21 guilty and should ultimately receive the death penalty,
22 also, depending on his involvement and the facts of the
23 crime.

24 But, again, people kind of fall one way
25 or the other on that. And there aren't any right or wrong

1 answers. We just want to ask each juror their honest
2 opinion about that. How do you feel about the prosecution
3 of accomplices in a death penalty situation?

4 A. I would favor the latter position you
5 described. If you had an opportunity to prevent a capital
6 murder and you failed to take it, that's as good as
7 committing it in my view.

8 Q. Okay. There's two theories of law in which a
9 person can be found guilty. One is the evidence shows that
10 they were actively involved, that they participated, aided,
11 directed, encouraged the crime to occur, even though they
12 didn't actually pull the trigger.

13 The second is called conspiracy. We, if I
14 conspire with other individuals to commit one crime and
15 during the course of that, committing that crime, someone in
16 the group commits another felony, murder, in a capital
17 murder situation, to further the conspiracy, then we can all
18 be held accountable and found guilty, if a jury believes
19 that we should have anticipated that a life would be taken.
20 And then that's just going to depend on the facts.

21 An example we give of the law is if Mr.
22 Wirsky and I decide we want to commit bank robbery, and the
23 plan calls for me to take a loaded gun in and threaten the
24 bank tellers. After I get their hands in the air and them
25 under control, he starts ransacking their drawers, putting

1 the money in a big sack.

2 During the middle of that robbery, I
3 decide to shoot one of the tellers. I don't like the way
4 they're looking at me, maybe he says one is going for an
5 alarm, but I shoot them intentionally and we flee. We're
6 caught soon after.

7 I could be prosecuted for capital murder
8 and I could receive the death penalty. Mr. Wirskye could
9 also be prosecuted because he assisted me in that and a jury
10 might believe from the facts that he should have anticipated
11 a death could occur. It's just going to depend on the
12 facts.

13 But to get him guilty, he doesn't even
14 have to have that intent. To get to the death penalty, we
15 do have to prove that he did anticipate. But that's the
16 conspiracy end of the law.

17 From your own personal point of view,
18 then, do you agree with the law that someone, a nonshooter
19 or an accomplice, can be prosecuted and could ultimately
20 receive the death penalty?

21 A. It can. It depends on the facts, as you said.

22 Q. Okay. What's important to you about the
23 prosecution of an accomplice in your own mind, as far as
24 fairness or the reason the State should or has a legitimate
25 reason to prosecute an accomplice for the death penalty?

1 A. It's a difficult question to answer. The word
2 "accomplice" could mean many things, an accomplice in the
3 murder, an accomplice in the robbery. An accomplice -- I'm
4 not 'sure I can really answer the question the way it's been
5 phrased.

6 Q. Okay. I try to keep them kind of openminded.
7 But what I'm looking for is maybe factors you think is
8 important when considering an accomplice --

9 A. Uh-huh.

10 Q. -- that sort of thing.

11 A. Was the accomplice voluntary?

12 Q. Okay. That's a good point. If it is
13 something in a duress, then that would be a defense. And
14 let me tell you this. Just because someone is present at
15 the crime, doesn't make him an accomplice. If we dupe,
16 let's say, someone to drive us there to the crime, they
17 didn't know we were committing a crime while we were inside,
18 that, obviously, would not be the situation. They have to
19 be participating in the crime and know what's going on.

20 A. Uh-huh.

21 Q. Active involvement in the crime, though, do
22 you feel that's an important factor to you?

23 A. Yes.

24 Q. Okay.

25 A. Yes, I do.

1 Q. It comes down to the actual fact situation and
2 we can't preview the facts to you. But I can tell you that
3 that is the theory of law that we're prosecuting this case
4 under, that Mr. Murphy is an accomplice, not the actual
5 triggerman. And that's what we're pursuing this case under.
6 And that's why we take so much time to make sure the juror
7 doesn't have personal objections to that theory of law and
8 agrees with the law. I take it from your answers you do
9 agree with the prosecution in a death penalty case of an
10 accomplice?

11 A. I do.

12 Q. Okay. Are you familiar with the method of
13 execution in Texas?

14 A. Yes.

15 Q. By lethal injection?

16 A. Yes.

17 Q. Growing up here, going to school here, living
18 here, I'm sure you're aware that Texas is a state that
19 actually does not only prosecute death penalty cases, but
20 actually carries out the death penalty?

21 A. Yes, I am.

22 Q. Leads the nation in executions.

23 A. I was aware we were among the leaders, if not
24 the leader.

25 Q. We are the leader. Don't lead every year, but

1 have many times. The method is the same, as you know, by
2 lethal injection. And it's often covered in the media all
3 the way down to the last words of the defendant or his
4 family. They often print all of that in the newspaper.

5 And, quite frankly, that's our goal in
6 this case. We believe that we have the type and quality of
7 evidence to convince a jury of the defendant's guilt, that
8 these questions should be answered in such a way that he
9 would be executed. The defense takes the opposite view.

10 We get all kinds of jurors down here,
11 obviously. Some are radically opposed to the death penalty.
12 Some are adamantly for it. Others are for it in certain
13 instances and feel they can make that decision. We have
14 others that are for it philosophically, but when it gets
15 down to it, they honestly tell us, they don't feel
16 comfortable making that decision. It would weigh on them
17 too much.

18 You've told us philosophically you do
19 believe in the death penalty and it should be enforced. Do
20 you feel you're the type of person who could sit on this
21 type of jury and make those decisions, if the State proved
22 it to you beyond a reasonable doubt?

23 A. Yes.

24 Q. Okay. Let's talk for a moment about these
25 Special Issues. I'd like you to just kind of read Special

1 Issue No. 1 to yourself.

2 A. No. 1 or all three?

3 Q. Let's take it one at a time.

4 A. (Prospective juror complies.) Okay.

5 Q. No. 1, have you read that one yet?

6 A. Yes.

7 Q. That question is the first one you get. You
8 don't get to it, unless you've found the defendant guilty.
9 Then you may hear additional evidence and then you get these
10 questions. It's asking the jurors to make a prediction
11 about the defendant's behavior in the future.

12 First of all, do you feel comfortable or
13 do you feel you could answer that question, if you are given
14 enough information?

15 A. Yes.

16 Q. What types of things would be important to you
17 in answering a question like that?

18 A. Past behavior.

19 Q. Okay. That type of information is available.
20 If someone's been convicted of a crime, committed any
21 crimes, bad acts, that's available, and those witnesses can
22 be produced and the jury can hear from that. A lot of
23 jurors tell us they'd like to see if there's a pattern, that
24 sort of thing.

25 You also get to review what their role

1 was in the crime itself. You get to look at that, what
2 you've already heard in the guilt/innocence stage, and then
3 make your decision based on the new evidence as well as what
4 occurred in the guilt/innocence stage. It starts out with a
5 no answer and the State has the burden of proof to prove to
6 you beyond a reasonable doubt it should be answered yes.

7 Just because you found him guilty,
8 doesn't automatically mean you should answer it yes. If it
9 were an automatic yes, there would be no reason for the
10 question, obviously. The law calls for the jurors to wait
11 for the new evidence to come in and then deliberate on that
12 evidence and then answer that question. Do you feel you
13 could do that?

14 A. Yes.

15 Q. The second question, that has to do with the
16 accomplice situation we've already talked about, and if
17 you'll take a moment just to review that.

18 A. (Prospective juror complies.) Okay.

19 Q. That question, it's kind of in two parts and
20 we tell all jurors this, we didn't write the question.
21 Someone in the Legislature did a long time ago. They kind
22 of run on a bit. But question No. 2 starts out with a no
23 answer. Again, we have to prove to you beyond a reasonable
24 doubt, it should be answered yes.

25 The first part of the question asks if

1 the defendant actually caused the death. So if he's the
2 triggerman or the one that did the murder, obviously, the
3 question is answered at that point.

4 But the latter part of the question has
5 to do with the situations of an accomplice. If we were able
6 to prove to you from all the facts that he didn't actually
7 cause the death, but intended to kill the deceased or
8 another person, I guess the major point there is the
9 intention, or that he anticipated that a life would be
10 taken.

11 I talked to you about the guilt/innocence
12 stage. From all the facts, to get to the guilt, we have to
13 prove that he should have anticipated and here we have to
14 prove that he did anticipate.

15 We can't stop a person and, obviously,
16 open up the top of his head and show you what his intent
17 was. We have to prove that by putting on all the evidence
18 of what happened prior, during, and after the crime. And
19 then jurors can make reasonable deductions using their
20 common sense what a person's intent is, from their actions
21 in the crime, whether they anticipated that a crime would
22 occur.

23 Some jurors can do that. Some tell us
24 they really don't feel comfortable judging a person's
25 intent. Other jurors tell us they feel they can, they do

1 that in their everyday lives. Do you feel you could answer
2 that question in regard to a person's intent? That is, you
3 could judge from their actions and all the relevant evidence
4 and make that type of determination?

5 A. Yes, I believe I could.

6 Q. Okay. Again, it just depends on the facts.
7 You can use the evidence of the crime itself and their role
8 in it, and also anything you've heard from their criminal
9 past or good past. You get to hear all the good and bad to
10 determine the answer to that question.

11 And then this last question is a little
12 different in that we don't have the burden of proof and
13 neither does the defense. It's the mitigation question.
14 Just take a moment to read that question.

15 A. (Prospective juror complies.) Okay.

16 Q. It's kind of a catchall. You know, you don't
17 get to that question unless you have found someone guilty,
18 that you've found they're a continuing danger, and that they
19 either intended the death, caused the death, or they
20 anticipated that a life would be taken. It allows the
21 jurors to look at everything, the crime itself, the person's
22 background, the circumstances, and then determine if they
23 think there's sufficient mitigating evidence to give that
24 life sentence.

25 You don't have to tell us what mitigating

1 evidence is. We don't give you a definition and you're not
2 required under law to tell us what it is. You're just
3 required to be able to assure the Court you will keep your
4 mind open to it, and if you see sufficient mitigating
5 evidence, you could answer it yes. If you don't, you could
6 answer it no.

7 Do you feel you could do that, keep your
8 mind open to that issue at the end of the trial?

9 A. Yes.

10 Q. As you sit there today, does anything come to
11 mind or do you have a gut reaction on anything you might
12 consider as potentially mitigating evidence?

13 A. The phrase "moral culpability," to me that
14 means that the person didn't understand the consequences of
15 his actions.

16 Q. Okay.

17 A. And that is something I would have to consider
18 carefully.

19 Q. Okay. You don't have to even agree with the
20 other jurors. You just have to be able to keep your mind
21 open to it. An example I give of that is maybe you will
22 have a case where the defendant went to Harvard, has got
23 four or five degrees, you know. You may have one juror who
24 views that as potentially mitigating, thinks they made
25 something out of their life. You may have another juror

1 that takes the opposite view. That's aggravating. Someone
2 with that opportunity and that intelligence, actually they
3 may view it as quite dangerous, hold it against them more.

4 But that just serves as an example how
5 it's just from your own perspective. Now, we often hear in
6 capital murder cases evidence of a person's background, how
7 they were raised. Maybe they had a bad upbringing, broken
8 home, poor upbringing, or maybe they were physically or
9 mentally abused.

10 Some jurors view that as mitigating.
11 Other jurors take a sympathetic view of it, but actually say
12 they know a lot of people that come from that background and
13 they overcome it. They don't get involved in capital murder
14 situations. They really wouldn't view that as mitigating,
15 once the person is an adult making these decisions. But
16 people feel differently about that type of background
17 evidence.

18 How do you feel about that? Do you have
19 any thoughts or opinions in that regard?

20 A. I think we would have to use great care in
21 decisions based on Special Issue No. 3, because we have to
22 be careful not to create an exempted class of defendant who
23 is not held ultimately responsible, versus others who are,
24 based on things beyond their control. There's a typo.
25 Sorry, I'm a technical writer.

1 Q. That's fine. We always kind of give the -- we
2 didn't write these. So we've had a lot of English teachers
3 correct them before.

4 THE COURT: How did I do on my guide?

5 PROSPECTIVE JUROR: On the what?

6 THE COURT: How did I do on my guide?

7 PROSPECTIVE JUROR: I think it was all
8 right. I didn't catch it until just now.

9 A. Have I answered your question?

10 Q. (By Mr. Shook) Yeah, I think so. I mean, I
11 take it from your answer, then, you necessarily wouldn't
12 look at that as though it might be bad as a potentially
13 mitigating situation because you wouldn't want to just make
14 -- if you've had a bad background, then you're not going to
15 get the death penalty, that sort of thing?

16 A. There are many people with bad backgrounds
17 who, nonetheless, make sound judgments.

18 Q. Okay. Oftentimes you will hear from experts
19 in this part of the trial, the punishment phase,
20 psychologists, psychiatrists, who can give opinions.
21 Sometimes the defense calls them. Sometimes the State will
22 call them. But they will offer opinions about future
23 danger. They'll -- a lot of times you'll hear a mitigation
24 expert talk about his opinions as to why the defendant acts
25 a certain way or reacts or maybe their background and that

1 sort of thing.

2 Again, it's almost always a psychologist
3 or a psychiatrist background. Jurors feel differently about
4 those experts. Some put a lot of faith in them. They
5 really see value in that and think those people can really
6 see into human behavior. Other jurors take kind of the
7 opposite view. They're a little cynical, believe that you
8 could probably find an expert to say whatever theory you
9 wanted to, if you looked hard enough or paid them enough
10 money.

11 And then we have other jurors that tell
12 us, I would look at it more or less as another piece to the
13 puzzle or pie, but I wouldn't put a whole lot of stock in it
14 or not believe in it automatically. It's just going to be
15 another piece of evidence I look at. But people view --
16 they have different views on that.

17 Do you have any opinions about those type
18 of experts, one way or the other?

19 A. I would agree with your third description that
20 we can learn a lot from people who study us, but we can't
21 regard them as infallible. So I would be willing to listen
22 to that sort of testimony, but I wouldn't automatically
23 accept it --

24 Q. Okay.

25 A. -- as the honest truth.

1 Q. All right. Some rules that apply in every
2 capital murder case are -- or not every capital, every
3 criminal case, the presumption of innocence. A person
4 that's at the beginning of the trial the jury has to presume
5 him to be innocent. The fact that he's been arrested,
6 indicted, or even that we're going through this jury
7 selection process, is no evidence of his guilt. Jurors have
8 to start out with that presumption and the State must
9 overcome that by presenting the evidence. Do you feel you
10 could follow that rule of law?

11 A. Yes.

12 Q. Now, this case received a lot of publicity.
13 Every juror, virtually every juror, has read or heard
14 something about it, so we ask every juror about that. What
15 do you recall seeing on the TV or following the news when
16 this happened?

17 A. I remember there being a jail break and those
18 who had broken out had been pursued for days, if not weeks.
19 And I believe that they were implicated in a robbery, as the
20 paperwork we've seen states, of a sporting goods store, and
21 that a police officer responding was killed. And the
22 escapees were later captured in Colorado and returned.

23 Q. Did you follow any of the subsequent court
24 proceedings on any of the cases or any of the other
25 defendants?

1 A. No.

2 Q. Okay. The bottom line is this. The jurors
3 cannot -- it doesn't make you ineligible to be a juror
4 because you have seen something on TV or read something in
5 the paper. Otherwise, we couldn't get a jury in high
6 publicity cases, if that were the rule. But you have to
7 only make your decisions based on what you hear in the
8 courtroom from the witness stand. We can't ask you to
9 forget about what you have read or heard, but we have to ask
10 you not to let that influence you in any way.

11 People form opinions about what they
12 read, but they can't let those opinions influence their
13 decisions in the case they are sitting on. And that's just
14 a common sense approach. Obviously, it's not always the
15 most accurate version of what happens when it's reported in
16 the newspapers right away. The -- is going to be more
17 accurate when a witness actually testifies.

18 But the bottom line is we just ask each
19 juror how they honestly feel. Only you can tell us, if you
20 can follow that particular rule of law. Do you feel you
21 could sit as a juror in this case, if chosen, and make your
22 decisions just based on what you hear in the courtroom and
23 not let what you have seen or heard prior to this influence
24 your decisions?

25 A. Yes. I don't pay a lot of attention to the

1 news. I try to avoid it. It depresses me. So I don't come
2 into this with a lot of knowledge of this case, only the top
3 line.

4 Q. The burden of proof in this case is on the
5 State of Texas as in every criminal case and it never shifts
6 to the defense. You might want to hear from the defense,
7 would anticipate they'll put on a case, but they're not
8 required to under law and you, as a juror, can't require
9 them to prove their client's innocence, because the burden
10 of proof never leaves this table. Could you follow that
11 rule of law?

12 A. Yes.

13 Q. The burden of proof goes to each and every
14 portion of the indictment. We have to prove every element.
15 We write the indictments. We're responsible for it. If we
16 fail on any portion of the indictment, you have a reasonable
17 doubt, you are obligated under law to find the defendant not
18 guilty. Could you follow that rule of law?

19 A. Yes.

20 Q. That includes even the county. We give an
21 example of Dallas County. That under the law is as
22 important as who committed the crime or how they committed
23 the crime or who they murdered. If you have a reasonable
24 doubt about Dallas County, perhaps it was a case that
25 occurred near the border. You believe the evidence showed

1 it may happen in Tarrant County.

2 That would show poor preparation on our
3 part, but as a juror you can't give us one of the elements.
4 You have to, if you had a reasonable doubt, even about that
5 element, you'd be obligated to find the defendant not
6 guilty. Could you do that?

7 A. I'm a little bit confused about that and what
8 it encompasses.

9 Q. Well, what the indictment -- what we basically
10 have to do is prove who committed the crime, how they did
11 it, who they murdered, and where. And some people view the
12 "where" as kind of a technicality. You know, they look, the
13 important part is who did the murder and who did they kill
14 and can you prove it to me. But the way -- and the reason
15 it comes down that we have to prove jurisdiction is every
16 county has their own District Attorney. And we can only
17 prosecute the cases in our county.

18 And I use that example because -- and I
19 don't anticipate it will happen, but it's a good example to
20 demonstrate how the law forces the State to prove every
21 portion of that indictment, not just who committed the
22 murder, but every portion of it. And if you had a
23 reasonable doubt, not, you know, maybe we proved everything
24 in your mind about who committed the murder, how they did,
25 the date, but you believe this thing happened, you had a

1 reasonable doubt about it happening in Dallas County, the
2 evidence may have showed it happened in Tarrant County,
3 under the law you would then be obligated to find the
4 defendant not guilty, because you would have a reasonable
5 doubt on just one of the elements.

6 Again, I don't anticipate that to happen,
7 but I use that example just to demonstrate how the law
8 works. If that did happen, I'm sure we would be out of our
9 jobs the next day and you would have every right to, you
10 know, go demand we be fired. But you can't help us out as a
11 juror. You'd have to -- it's kind of like being a referee
12 or an umpire in a baseball game. You just have to call the
13 balls and strikes as you see them.

14 Do you feel you could follow the law in
15 that regard and require the State to prove to you each and
16 every element, even Dallas County, beyond a reasonable
17 doubt, and if we failed in that, could then find the
18 defendant not guilty?

19 A. Yes.

20 Q. Okay. Fifth Amendment often comes up. If
21 anyone is charged with an offense, they have an absolute
22 right to testify and no one can stop them. But if they
23 choose not to, if they choose to exercise their Fifth
24 Amendment privileges, the Judge would instruct you that you
25 can't hold that against him in any way.

1 You can't consider that as evidence
2 because there could be numerous reasons why someone may not
3 testify. They may not do well in front of people. They may
4 be poorly educated. May have some type of speech
5 impediment, I don't know. They might look guilty when
6 they're not. They could be just following their lawyer's
7 advice. They could be very guilty and would look worse.

8 The law takes care of that by instructing
9 the jurors not to consider that in any way. Do you feel you
10 could do that?

11 A. Yes.

12 Q. Oftentimes parole laws come up in the media.
13 The Judge would instruct you --

14 A. What?

15 Q. Parole laws.

16 A. Parole laws, okay.

17 Q. In a capital murder situation, the Judge would
18 instruct you that a capital life sentence means a defendant
19 would have to serve forty calendar years before they became
20 eligible for parole. Then that doesn't even mean they would
21 be paroled. But then he would also tell you that you can't
22 consider that or any of the other parole laws in your
23 decisionmaking process. You can't come into your
24 deliberations because we and he and the jury doesn't have
25 any control over the parole laws. You just have to consider

1 a life sentence, a life sentence, during your deliberations.

2 Could you follow that rule of law?

3 A. Yes, I could.

4 Q. Okay. Obviously, police officers often
5 testify. The law says and people respect the job they do,
6 but you can't start them out ahead of other witnesses. You
7 have to wait for them to testify and then base your
8 decisions on their credibility. Do you feel you could
9 follow that rule of law?

10 A. Yes.

11 Q. Okay. The bottom line on these questions is
12 you have to wait, listen until all the evidence is in, and
13 then make your decisions. There aren't any automatic
14 answers. We've gone over that. It's that the law
15 contemplates that the jurors will wait, weigh them all, and
16 answer them separately, and I believe you said you could do
17 that.

18 A. Yes.

19 MR. SHOOK: I'd like to have just one
20 moment, Judge.

21 Q. (By Mr. Shook) Well, we covered a lot of
22 ground. Do you have any questions over anything we've gone
23 over?

24 A. No, I don't.

25 Q. Okay. Well, I appreciate your patience.

1 MR. SHOOK: That's all the questions I
2 have. And we'll pass the juror, Your Honor.

3 THE COURT: Ms. Busbee?

4 CROSS-EXAMINATION

5 BY MS. BUSBEE:

6 Q. Good morning, Mr. Smith. Usually we don't
7 take so much time with all the jurors we have in the
8 morning, but we've been doing it today, and I appreciate
9 your patience with us. It's kind of tedious to be asked
10 questions about something that, we're just now informing you
11 of what the law is after having asked you all these
12 questions back in May.

13 I have some questions about some things
14 you had in your questionnaire and some things that you
15 discussed with Mr. Shook. First of all, I don't know
16 exactly how you put it, but you were asked if you had always
17 had this opinion about the use of the death penalty and you
18 had some -- you mentioned something about what you had
19 learned in your family or through your family. Could you
20 elaborate on that?

21 A. I can't recall specifics, but I believe at one
22 time, at many times, one or another of my parents, who, of
23 course, influenced me, as all of our parents did, were
24 believers in capital punishment. The subject arose. I
25 don't recall them ever expressing any doubt about it.

1 Q. Okay. And while we're talking about your
2 family, your cousin who was a District Attorney in Colorado,
3 what county? Is it a he?

4 A. She.

5 Q. A she. What county does she work in?

6 A. I don't know.

7 Q. Okay. And you never had any discussion with
8 her about this particular case?

9 A. No. I was told by my father that she had
10 appeared on television.

11 Q. How often do you see this cousin?

12 A. I can't remember the last time I saw her.

13 Q. What else did your father say? Anything that
14 she may have said or --

15 A. No. I believe he called her to tell her he
16 had seen her on television.

17 Q. But you didn't know anything else about her
18 appearance?

19 A. No.

20 Q. Okay. What's her name?

21 A. First name is Janelle. I don't know her last
22 name. I'm not even certain if she's married.

23 Q. Okay. Not real close. Okay. You know, you
24 used an interesting word because it's a word that the
25 Supreme Court of the United States has used in discussing

1 certain death penalty issues and that was "proportionate."
2 And I'm not sure what you mean by that, because you are very
3 precise in your language. But that, you just put
4 proportionate. Could you elaborate on that or expand on
5 that a little bit?

6 A. That grew from a conversation, probably more
7 of a debate, that I had at a dinner table with someone who
8 believed that the death penalty would be appropriate for
9 someone convicted of rape. And while I understood her
10 feelings on the subject, I couldn't quite square that in my
11 mind.

12 And later I learned from an article I
13 read that the argument there is if you have the death
14 penalty for a crime that is not the actual deliberate
15 killing of someone, then you introduce disproportionality.
16 In other words, if a rapist knew he would be executed for
17 his crime, it would give him another incentive to kill his
18 victim to eliminate what is usually the only witness. And I
19 saw that there was a certain proportionality involved there
20 in the punishment.

21 Q. Okay. And that leads me right into my next
22 question. I mean, we had discussed with you, and the State
23 has indicated to you, that they are prosecuting this case as
24 an accomplice, as opposed to someone who actually committed
25 the murder. And you had some thoughts about that. But I

1 don't think that anybody let you tell us your whole feeling
2 about it. And I'm not asking you at this point as to
3 whether or not that person may be guilty of capital murder.

4 It's a pretty commonly held belief that
5 if you are a party, in other words, you participate, aid,
6 abet, encourage, assist -- I can't remember all the words in
7 the statute. But if you're involved in a case and not, you
8 know, just an innocent bystander or a duped bystander in
9 their example, would you share the same guilt for the
10 commission of that offense?

11 My question goes to the punishment issue.
12 What would make a death penalty in your mind in the proper
13 proportion, if you will, for an accomplice?

14 A. I would have to answer the question, did the
15 accomplice know that there was a possibility that a murder
16 would be committed?

17 Q. Okay. Well, and that brings me, of course, to
18 Special Issue No. 2. The law requires that the State prove
19 that they did anticipate, as opposed to should have or ought
20 to have. And if you are uncomfortable with that, you can
21 tell us. There's no right or wrong answers. The reason
22 that we spend this time, so much time with people, is that
23 it's a very important decision.

24 And because it involves life or death
25 issues, people's emotions are more involved than they would

1 be in deciding whether someone had written a hot check or
2 driven drunk. So, in your scheme of things, it wouldn't
3 need to be proved to you that they actually did anticipate
4 that a life would be taken. Is that what you're telling us?

5 A. You are doing some fine parsing of definitions
6 here.

7 Q. Doesn't it?

8 A. There does seem to be a lot of burden on the
9 State to show anticipation rather than, for example,
10 possibility.

11 Q. Right.

12 A. In my view, if one knows that something could
13 happen and fails to take action to prevent it, knowing that
14 it's a bad thing, then one's guilty.

15 Q. Okay. And you would in your scheme of things
16 would -- would authorize the death penalty for that?

17 A. In a case of capital murder, yes.

18 Q. Okay. I thought that's what I was hearing,
19 kind of between the lines, if you will, of the discussion
20 you were having with Mr. Shook. But --and lots of jurors
21 say that to us, not as well as you have, but some in the
22 same vein. If I have determined that somebody is guilty as
23 a party to the offense, of the offense of capital murder,
24 you have already decided that that person should have known,
25 because that's one of the things that you have to decide to

1 find them guilty.

2 You're telling me that in the way that
3 you think of the proper case, should have anticipated that a
4 life would be taken is enough. You don't need to hear that
5 they, or have it proved to you, that they did anticipate?

6 A. The difference between should have anticipated
7 and did anticipate, I think, depends on the facts, and the
8 knowledge available to --

9 Q. Certainly.

10 A. -- to the defendant.

11 Q. But I'm probing you so painfully about this
12 because if, in your feelings, I'm not comfortable with that,
13 but it's the best way to put it, if your gut feeling is, if
14 I found out or found that they should have anticipated, you
15 don't have to prove to me necessarily anymore that they did
16 anticipate. They should have anticipated and did
17 anticipate. I'm not really asking that right.

18 They have to prove to you that they did
19 anticipate. You have said to me in your scheme of things,
20 if someone should have anticipated. So the law says they
21 have to prove to you more in order to answer that question
22 yes, which would affect, you know, affect the death
23 sentence.

24 You're saying to you, should have
25 anticipated is enough?

1 A. On further thought here, I'm seeing the
2 distinction you're making. And if the State has to prove
3 that one did anticipate that a life would be taken, then I
4 have to go with the State on that, with what they are
5 required to do.

6 Q. In other words, you would make them prove to
7 you?

8 A. Yes.

9 Q. Okay. Fair enough. My throat is dry today is
10 why I'm drinking so much water. I know you know something
11 about this case, everyone does. And I just have to ask you,
12 because you've been honest with us in everything else that
13 you've told us, if you haven't kind of predecided whether or
14 not you think that the defendant would be a future danger,
15 based on what you know of the case?

16 A. No. I know -- I know nothing about the
17 defendant.

18 Q. Okay. Fair enough. I want to talk to you a
19 little bit about this mitigation issue. And you made really
20 an interesting comment because you -- most people have not
21 given the death penalty much thought, even in between
22 filling out this questionnaire and coming down here. It
23 sounds to me like you have given it some thought, even prior
24 to the time that you filled out the questionnaire.

25 But in our scheme and in our hypothetical

1 capital murder that we're grilling you about, after having
2 found the defendant guilty of the offense of capital murder
3 and finding a future danger and that that person did
4 anticipate that a life would be taken, would your mind be
5 closed to giving a life sentence?

6 A. Don't we have one more?

7 Q. Well, and that's the question. Would there be
8 any way that you would give that person a life sentence?

9 A. I can't rule that out. I just can't rule that
10 out.

11 Q. Okay. What -- I know we asked you or the
12 State asked you some questions about whether you thought
13 this, that, or the other was mitigating. And having been
14 here another 30 minutes, can you think of some things that
15 you might consider as mitigating?

16 A. I haven't given enough thought to give you an
17 answer to that question.

18 Q. You mentioned something having to do with the
19 personal moral culpability of the defendant. Could you
20 expand on that a little bit more?

21 A. Well, I believe each of us has the ability to
22 understand the consequences of our actions. We have the
23 ability, whether we choose to practice it or not, is up to
24 us. If one, perhaps, from a mental defect does not have
25 that capability, and the only examples I can think of would

1 be people who are probably in institutions now because
2 they've shown that they don't have that ability and they get
3 into trouble because of it, that would be a factor if one
4 doesn't understand the consequences of one's actions.

5 Q. Well, now, let me take you there, then.
6 Someone who doesn't understand the difference between right
7 and wrong, wouldn't be here, because they would or someone
8 who is mentally retarded would not be here. So that's not
9 really the class of people that we're talking about in this
10 consideration.

11 So other than that, would there be any
12 kind of mitigation that would -- that you would ever
13 consider that would -- that would cause you to vote for a
14 life sentence as opposed to a death sentence?

15 A. I can't rule out that there would be something
16 that I would consider, just because those things have not
17 been presented to me in the past.

18 Q. Certainly. Well, we're actually -- we're
19 probably not supposed to suggest any of these things to you,
20 but it's almost impossible to ask someone about this
21 without, you know, discussing possibilities, because it's
22 such a vague question and you can't see what you are going
23 to receive in the future. But, you know, the defense is
24 entitled to a juror who is open to that. And that's kind of
25 why I'm asking you that, because you seem kind of reluctant

1 to consider anything in mitigation. Is that a fair
2 statement?

3 A. I'm 38 years old. And as I've gotten older,
4 I've learned that there's a lot I don't know and there's a
5 lot I do know. And so I don't come in here in the belief
6 that I know all I need to know to make a decision. And so I
7 guess what I'm trying to tell you is, I'm willing to listen
8 to the case and I'm willing to listen to what you and as
9 well as the State believe are these mitigating
10 circumstances. I don't have prejudgments on those things.

11 Q. So you are telling us that you could vote for
12 a life sentence, as opposed to a death sentence?

13 A. I could do that.

14 Q. Just one more thing, Mr. Smith. You seem
15 bothered by some questions that the district attorney asked
16 you about what he's calling technicalities, but let me pose
17 this to you. If you heard a case where the State -- the
18 person was clearly guilty, and -- but the State had, through
19 inadvertence or maybe because a witness testified to
20 something that maybe they hadn't anticipated, but there was
21 a reasonable doubt as to something they were required to
22 prove, would you say, well, this just doesn't seem like
23 justice, but the law requires me to say not guilty. Could
24 you do that?

25 A. Yes, I could.

1 Q. Now, is there anything you want to say to us
2 about this scheme or anything that you think we may find
3 important, either side? We got to ask you a lot of
4 questions. I'm just curious.

5 A. I'll probably have lots of questions on the
6 drive home.

7 Q. You are doing a whole lot better than most
8 people do, because -- I don't know if you speak for a living
9 or are just comfortable expressing your views. But some
10 people are just like deer in the headlights and they aren't
11 able to talk very much. Well, I appreciate your time, sir.

12 MS. BUSBEE: There's all the questions I
13 have of this juror.

14 THE COURT: Thank you, Mr. Smith. If you
15 will stand outside for just a few moments, we'll have you
16 back.

17 [Prospective juror out]

18 THE COURT: What says the State?

19 MR. SHOOK: State has no challenges for
20 cause.

21 MS. BUSBEE: Defense has no challenge for
22 cause.

23 THE COURT: Would you like a moment?

24 MS. BUSBEE: Not really.

25 THE COURT: State will accept the juror.

1 MS. BUSBEE: We'll exercise a preemptory
2 challenge, Your Honor.

3 THE COURT: Ask Mr. Smith to come back
4 in, please.

5 [Prospective juror in]

6 THE COURT: Mr. Smith, we want to thank
7 you for your very thoughtful and very honest and open
8 answers. The parties have agreed they are not going to seat
9 you on this jury. Our jobs would be a whole lot easier, if
10 we had enough people like you to come in and understand the
11 issues as quickly, but this case is not going to be for you.

12 THE COURT: Next juror is juror No. 3822,
13 Maurene Hill. Mr. Shook?

14 MR. SHOOK: Judge, we can agree on juror
15 Maurene Hill, letting her go.

16 MS. BUSBEE: We do.

17 THE COURT: The Court does not appreciate
18 scheduling jurors down to the court and then having the
19 parties agree especially -- further review these
20 questionnaires before we run into a problem. And I hate the
21 aggravation of bringing these folks down. I will
22 reluctantly allow the parties to agree to excuse juror No.
23 3822.

24 Juror No. 2746, currently scheduled for
25 Tuesday, September 30, at 1:30, Ms. Lela Allison, has been

1 in contact with the Sheriff. Sheriff Cook, would you please
2 state on the record your conversation with Ms. Allison?

3 SHERIFF COOK: Ms. Allison contacted the
4 Court about three and a half weeks ago to inform us that she
5 was currently being treated for pneumonia by her doctor.
6 She had already been to the hospital once. And upon talking
7 with Ms. Allison yesterday, which was some three and a half
8 weeks after my first discussion with her, she has been
9 hospitalized again since that day and is still being treated
10 by her doctor for pneumonia and is not improving.

11 THE COURT: What says the State?

12 MR. SHOOK: State can agree to excuse the
13 juror.

14 MS. BUSBEE: As can the defense.

15 THE COURT: Be so kind as to call
16 Ms. Allison back and tell her to get well.

17 SHERIFF COOK: We will do that.

18 [End of Volume]
19
20
21
22
23
24
25

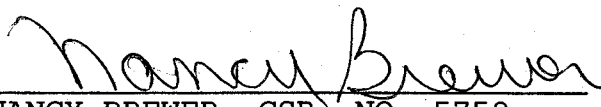
1 STATE OF TEXAS *

2 COUNTY OF DALLAS *

3 I, NANCY BREWER, Official Court Reporter for the 283rd
4 Judicial District Court, do hereby certify that the above
5 and foregoing constitutes a true and correct transcription
6 of all portions of evidence and other proceedings requested
7 in writing by counsel for the parties to be included in this
8 volume of the Reporter's Record, in the above-styled and
9 numbered cause, all of which occurred in open court or in
10 chambers and were reported by me.

11 WITNESS MY OFFICIAL HAND on this the 4 day of

12 March, 2004.

13
14 
15 NANCY BREWER, CSR, NO. 5759
16 Expiration Date: 12-31-04
17 Official Reporter, 283rd JDC
18 Frank Crowley Crts. Bldg. LB33
19 133 No. Industrial Blvd.
20 Dallas, TX 75207
21 (214) 653-5863
22
23
24
25

REPORTER'S RECORD

VOLUME 24 OF 61 VOLUMES

74851

TRIAL COURT CAUSE NO. F01-00328-T

STATE OF TEXAS * IN THE DISTRICT COURT
VS. * DALLAS COUNTY, TEXAS
PATRICK HENRY MURPHY, JR. * 283RD DISTRICT COURT

INDIVIDUAL VOIR DIRE

FILED IN
COURT OF CRIMINAL APPEALS

MAR 9 - 2004

Troy C. Bennett, Jr., Clerk

On the 30th day of September 2003, the following
proceedings came on to be heard in the above-entitled and
numbered cause before the Honorable Vickers L. Cunningham,
Sr., Judge Presiding, held in Dallas, Dallas County, Texas.

Proceedings reported by machine shorthand.

ORIGINAL

A P P E A R A N C E S

APPEARING FOR THE STATE

Mr. Toby Shook
SBOT NO. 18293250
And
Mr. Bill Wirskye
SBOT NO. 00788696
Assistant District Attorneys
133 No. Industrial Blvd.
Dallas, Texas 75207
Phone: 214/653-3600

APPEARING FOR THE DEFENDANT

Ms. Brook Busbee
Attorney at Law
SBOT: 03488000
703 McKinney Ave. Ste. 312
Dallas, TX 75202
214/754-9090

Mr. Juan Sanchez
Attorney at Law
SBOT: 00791599
5630 Yale Blvd.
Dallas, TX 75206
214/365-0700

PROSPECTIVE JUROR INDEX

<u>PROSPECTIVE JUROR</u>	<u>CRT.</u>	<u>STATE</u>	<u>DEFENSE</u>	<u>VOL.</u>
Nelda Pitts	4	5		24
Sandra Geeslin	14	17		24
Gayle Melara	19	20		24
Carol Cunningham	29	31	69	24
Bonny Martin	97	99		24
Jan Anderson	112	116		24

P R O C E E D I N G S

THE COURT: Ms. Nelda Pitts.

[Prospective juror in]

THE COURT: Good morning, how are you?

PROSPECTIVE JUROR: Good morning, sir.

THE COURT: We have juror No. 2558, Nelda Charline Pitts. Good morning, Ms. Pitts. Thank you for being here early. We take -- we schedule three people in the morning and three in the afternoon and whoever is first gets to go first. So we'll be out of here long before the others get started. Have you had enough time to read the guide I prepared for you?

PROSPECTIVE JUROR: I did read it, yes.

THE COURT: You're not supposed to understand it all right now. That's what this opportunity this morning is, is for the attorneys to visit with you and help you understand how all this law relates. And if you have questions, this is the time we want you to ask questions, so you'll begin to understand the scheme we're talking about.

Did you also have time to review the questionnaire that you filled out for us back in May?

PROSPECTIVE JUROR: I got about halfway through it.

THE COURT: All right. Once again, the

1 idea is if they ask you a question, what were you thinking
2 about when you answered this back in May, you can review it
3 and think about that again.

4 There are no wrong answers today, just
5 honest ones. Please, if you don't understand a question,
6 people come in that are kind of a little nervous, this is a
7 whole lot more stressful for folks than the jury service
8 downstairs where you were one of 700 people. This is the
9 most informal way we can do it, but it's the only way that
10 we can properly bring you up to speed as to the law.

11 At the end of the process I have two
12 questions I have to ask you. First question is, do you
13 understand the law? Second is, can you follow the law?
14 That's the big picture I have for you.

15 The only question I have for you at this
16 time is will you be able to serve this Court for two weeks
17 beginning on November 10th?

18 PROSPECTIVE JUROR: Yes.

19 THE COURT: Thank you very much.

20 Mr. Shook?

21 MR. SHOOK: May it please the Court?

22 NELDA PITTS,
23 having been duly sworn, was examined and testified as
24 follows:

25 DIRECT EXAMINATION

1 BY MR. SHOOK:

2 Q. Ms. Pitts, my name is Toby Shook. I'm going
3 to be asking you questions on behalf of the State this
4 morning. And, as the Judge said, there aren't any right or
5 wrong answers. We're just looking for your honest opinions.
6 I want to go over some of the things that were on your
7 questionnaire, do some followup there, and then talk about
8 the capital murder situation, your opinions on that, and
9 some of the rules and laws that might apply to this case.
10 If you have any questions at any time feel free to ask,
11 okay?

12 Looking at your questionnaire, I see you
13 were born and raised in Wichita Falls and have lived there,
14 looks like 50 years, and you've lived in Dallas County for
15 about the past six years or so?

16 A. Yes, I believe so.

17 Q. What caused you to come to Dallas County?

18 A. My little mother moved to the Dallas area and
19 she's way up in years, and I thought it best.

20 Q. Okay. Kind of keep watch over her, that sort
21 of thing?

22 A. (Prospective juror nods head.)

23 Q. And you work for, is it, Inverness --

24 A. Yes.

25 Q. -- Corporation? What do you do with them?

1 A. This is a branch of a jewelry company based
2 out of the United Kingdom, and I'm in the ear piercing
3 division.

4 Q. Okay. And you've been with them for some
5 seven and a half, I guess close to eight years?

6 A. Somewhere about.

7 Q. All right. Have you been down on jury duty
8 before and actually served on a jury?

9 A. Yes, I have.

10 Q. What type of case was that?

11 A. It was several years ago across the way over
12 here, and it was, gosh, I really don't know what type you
13 would call it, but a man had bought a business and was --
14 some things were misrepresented.

15 Q. Okay. Some type of civil lawsuit?

16 A. I assume so, yeah.

17 Q. Did the jury actually reach a verdict?

18 A. Yeah.

19 Q. Okay. How did that come out?

20 A. In his favor.

21 Q. Okay.

22 Q. How did the deliberations go? Was it
23 something where y'all argued a bunch or did the case seem
24 pretty cut and dried to you?

25 A. Well, there was some arguing, but I don't

1 think it went on and on.

2 Q. Okay. Nothing too unpleasant or anything like
3 that?

4 A. No.

5 Q. Sometimes we talk to jurors and the last thing
6 they want to do is be on another jury because of the
7 horrible jury experience they've had, arguing, and that sort
8 of thing. But it doesn't sound like you had that situation.
9 You've never been down on a criminal case, though?

10 A. No.

11 Q. Okay. We ask in the questionnaire about if
12 you've known anyone that's been a victim of violent crime,
13 and you made a note about an aunt that had been murdered a
14 number of years ago.

15 A. (Prospective juror nods head.)

16 Q. Tell us a little bit about that situation.

17 A. Gosh, it was mid-40's, so before you were
18 born. She was murdered by her husband.

19 Q. Okay.

20 A. And he was sent to the penitentiary.

21 Q. Do you recall how long he was sent to the
22 penitentiary?

23 A. Well, he served nine years. He was given 99.

24 Q. Okay. And did that occur, where did that
25 occur, here in Texas?

1 A. Wichita Falls, Texas.

2 Q. Okay. Did y'all ever have any contact with
3 him after he was released, anything like that?

4 A. You mean personal contact or knew where he
5 was?

6 Q. Any, did you ever come across him anymore?
7 Have to deal with him at all?

8 A. No.

9 Q. Okay. I take it you think that the sentence
10 was fair, but his early release may have been a problem, if
11 he only served nine years on that type of thing?

12 A. Absolutely.

13 Q. Okay. Those laws have changed somewhat over
14 the years and I'll talk about that in a little while as it
15 applies to a capital murder case, because that comes up.
16 People have opinions on the parole laws from time to time.

17 Let me talk to you a little bit about how
18 you feel about capital murder. As far as the law goes, do
19 you favor the death penalty as a law?

20 A. Yes, I do.

21 Q. Can you tell us in your own personal
22 viewpoints on it why you favor it, the purpose you feel it
23 serves society?

24 A. I just strongly believe in it. I can't think
25 of any real reason why I believe in it.

1 Q. Do you think it's a just sentence for certain
2 crimes?

3 A. Just sentence? Absolutely.

4 Q. Has it been a law you've believed in your
5 entire adult life?

6 A. Most of my life, yes.

7 Q. Okay. You said in your questionnaire that you
8 did follow a lot of some crimes, local and national crime
9 stories.

10 A. Well, the high profile things.

11 Q. Any of them come to mind, names of the
12 defendants or the particular crimes recently that you
13 followed in the past couple of years?

14 A. Well, I don't know any names. One thing that
15 I remember was the case where the gal drove the guy in the
16 windshield home.

17 Q. Right over there in Ft. Worth?

18 A. Uh-huh.

19 Q. Okay. And, obviously, this case received a
20 lot of publicity when it occurred and I think almost every
21 juror, except maybe one or two, have in their questionnaires
22 said that they've read or seen something on TV, which
23 doesn't make you ineligible to be a juror. Obviously, if
24 that were true, then we could never seat a jury.

25 But we like to ask each juror what they

1 recall about hearing about the case, what they saw on TV.
2 What is it of the details you recall at this time about what
3 you saw when it occurred?

4 A. What we were just discussing, this particular
5 case?

6 Q. On this, on this case here involving the Texas
7 Seven case, involving the officer that was shot at the
8 Oshman's.

9 A. Oh, what do I recall about it?

10 Q. Yes, ma'am.

11 A. Well, the fact that they escaped from prison,
12 had someone set them up with a vehicle at a Wal-Mart parking
13 lot, the incident in Irving, ending up in Colorado.

14 Q. Did you follow any of the subsequent court
15 proceedings after the Colorado arrest?

16 A. No, no, nothing.

17 Q. And as I said, most of the jurors have read or
18 seen something on TV about this story, which doesn't make
19 you ineligible to be a juror. The rule of law that applies
20 in these cases is if you were to sit on a jury, you'd have
21 to make your decisions just based on what you hear in the
22 courtroom from the witness stand, not on something you saw
23 on TV or read in the newspaper.

24 Obviously, we can't ask you to forget
25 what you've seen, but you have to be able to tell the Judge

1 that you're not going to let that influence your opinions,
2 that you'll make your decisions based on the evidence and
3 the witnesses that are actually here in the courtroom. Just
4 common sense will tell you that's where your better evidence
5 is going to come. The newspapers aren't always accurate.
6 The TV shows aren't accurate. Your more accurate evidence
7 will come from the actual witnesses when you get to hear
8 them testify and judge their credibility.

9 Will you be able to follow that rule of
10 law? And if you were chosen as a juror and right now, of
11 course, we have to deal with it hypothetically, but if you
12 were chosen as a juror, would you be able to make your
13 decisions just based on the testimony you hear here in the
14 courtroom?

15 A. Sir, I'm not sure.

16 Q. Okay. What -- and what are you not sure
17 about?

18 A. In my mind I may have already made my
19 decision.

20 Q. Okay. As far as the guilt, or --

21 A. Yes.

22 Q. Okay. And that's the bottom line is, we just
23 have to depend on each juror to tell us. Some can follow
24 that rule of law and tell the Court, I'll wait and make my
25 decision based on the witnesses. Others tell us sometimes

1 no, I think I've already formed an opinion that's going to
2 influence my decision before I hear any evidence.

3 And that's the bottom line is, obviously,
4 we have to have twelve jurors who are not going to have
5 their opinions influenced by anything they've read or heard
6 on TV, that can wait and make their decisions based on the
7 actual evidence. But only you can tell us that. As best
8 you know yourself, do you feel that you could follow that
9 rule of law and make your decision just based only on the
10 witnesses here in court?

11 A. I probably have already made my mind up.

12 Q. Okay. And that's as far as the guilt of the
13 defendant?

14 A. (Prospective juror nods head.)

15 Q. Is that based on what you've already seen in
16 the news coverage and that sort of thing?

17 A. Yes.

18 Q. Okay.

19 MR. SHOOK: Judge, that's all the
20 questions I have.

21 MS. BUSBEE: I believe we have reached an
22 agreement on this juror.

23 THE COURT: Ms. Pitts, thank you for
24 being honest, very much so. But we can't seat you on this
25 jury because you know too much. Okay? Thank you much. You

1 are free to go.

2 [Prospective juror out]

3 THE COURT: Ms. Geeslin.

4 [Prospective juror in]

5 THE COURT: Good morning. How are you?

6 PROSPECTIVE JUROR: I'm fine.

7 THE COURT: We've got juror No. 2559,
8 Sandra Lavell Geeslin, is that pronounced correctly?

9 PROSPECTIVE JUROR: Yes, sir.

10 THE COURT: Welcome to the 283rd. Thank
11 you for being here on time this morning. Have you had
12 enough time to review the guide I provided for you?

13 PROSPECTIVE JUROR: I'm sorry?

14 THE COURT: Have you had enough time to
15 review the orientation guide I provided for you?

16 PROSPECTIVE JUROR: Yes, sir.

17 THE COURT: I also provided a copy of
18 your questionnaire that you filled out for us back in May.
19 The attorneys may want to refer to a question that you've
20 answered and ask you to explain or expound upon your
21 answers.

22 People come in and they're kind of
23 nervous when they come in this morning like a deer in the
24 headlights, when all of a sudden you might think you're
25 coming in to another group meeting of about 700 or so people

1 downstairs and all of a sudden you find that you're the
2 focus of attention. Please try not to be nervous. The best
3 thing about this is there are no wrong answers, just honest
4 ones.

5 At the end of the process I have two
6 questions I have to ask. Number one is do you understand
7 the law? And number two, can you follow the law? I've
8 given you the law up front. It's a lot to understand and
9 the attorneys are going to visit with you about that and
10 help you understand how it relates to this process. And
11 then please, please ask questions, if you don't understand.
12 This is your opportunity to understand what the law is.
13 Fair enough?

14 PROSPECTIVE JUROR: Fair enough.

15 THE COURT: Okay. With that,
16 Mr. Wirsky, would you like to inquire? Oh, I have a
17 question, I'm sorry, I didn't ask. Will you be able to
18 serve this Court for a period of two weeks beginning on
19 November 10th?

20 PROSPECTIVE JUROR: No, sir, I won't.

21 THE COURT: And why not?

22 PROSPECTIVE JUROR: Just recently, in
23 fact, last week, I have a sister which is 79 that just had
24 two strokes and she is not able to wait on herself. I have
25 a brother-in-law that just also got out of the hospital and

1 he has a heart problem. His heart is at 40 percent. He's
2 also disabled to wait on theirselves. And at this time I have
3 a nurse staying with them until the lady -- I have a lady
4 next door that I pay that stays with them during the day
5 while I work.

6 But I have to be with them at night
7 because I have no one to stay with them at night and they
8 have to have 24-hour care at this time. I also have to take
9 -- be able to take them to the doctor for their
10 appointments. I'm the only one. I live with them, so I'm
11 the only one that can do that.

12 THE COURT: Ms. Geeslin, where do you
13 work, ma'am?

14 PROSPECTIVE JUROR: I work for First
15 American Tax Service.

16 THE COURT: And do you work full time?

17 PROSPECTIVE JUROR: I work full time,
18 yes, sir.

19 THE COURT: Well, I've got good news for
20 you. We work business hours here and you will be able to go
21 home at 4:30 in the afternoon.

22 PROSPECTIVE JUROR: Okay.

23 THE COURT: So that won't interfere with
24 your ability to care for your family members.

25 PROSPECTIVE JUROR: Okay. What about

1 their doctor's appointments?

2 THE COURT: Well, you'll just have to,
3 you know, work around that for the two weeks we're here,
4 just like you do at work. I mean --

5 PROSPECTIVE JUROR: Would I be able to
6 take them to their doctor's appointments?

7 THE COURT: Well, not during those two
8 weeks you wouldn't be able to. But as it gets further along
9 in the process, I can give you a better idea as to timing.
10 At this point I just need you to schedule the two weeks out,
11 and if you work normal business hours, then this won't
12 interfere. It will interfere with your work, but it won't
13 interfere with your family obligations.

14 PROSPECTIVE JUROR: Okay.

15 THE COURT: All right? Mr. Wirskye.

16 MR. WIRSKYE: May it please the Court?

17 SANDRA GEESLIN,
18 having been duly sworn, was examined and testified as
19 follows:

20 DIRECT EXAMINATION

21 BY MR. WIRSKYE:

22 Q. Ms. Geeslin, how are you this morning?

23 A. I'm pretty good. You'll have to speak up a
24 little loud. I have a hearing problem a little bit.

25 Q. Okay.

1 A. If someone has their back toward me, I can't
2 hear as well.

3 Q. Okay. It sounds like you've got quite a bit
4 going on in your life right now?

5 A. I do have my hands full.

6 Q. And probably the last thing you need is to be
7 a juror on a death penalty case; is that right?

8 A. Well, that would be the last thing. But I
9 feel like it's my duty.

10 Q. And we understand that and the Judge is under
11 certain restrictions. He can't excuse you because of what
12 you've told him, your personal situation, but the lawyers
13 can get together and agree to excuse a person, if they've
14 got a lot going on like you do. And I think both sides have
15 agreed to excuse you. We know you've got other things you
16 need to be doing right now. But we appreciate you coming
17 down, okay?

18 A. Okay. And thank you.

19 Q. Thank you, ma'am.

20 MR. WIRSKYE: Judge, that's all I have.

21 MS. BUSBEE: For the record, we agree.

22 THE COURT: Ms. Geeslin.

23 PROSPECTIVE JUROR: Yes, sir?

24 THE COURT: The attorneys can be a lot
25 nicer than I can. But I sympathize with your family

1 situation and I hope they do recover, and they have agreed
2 to let you go.

3 PROSPECTIVE JUROR: Okay. Thank you.

4 THE COURT: All right.

5 PROSPECTIVE JUROR: I'm sorry this
6 happened.

7 THE COURT: You can't help that.

8 PROSPECTIVE JUROR: Thank you.

9 [Prospective juror out]

10 THE COURT: Ms. Melara.

11 [Prospective juror in]

12 THE COURT: Juror No. 2583, Ms. Michelle
13 Gayle or Gayla Melara? How do you pronounce it?

14 PROSPECTIVE JUROR: Gayle. Gayle.

15 THE COURT: Gayle Melara?

16 PROSPECTIVE JUROR: Uh-huh.

17 THE COURT: Good morning, Ms. Melara.
18 How are you?

19 PROSPECTIVE JUROR: Fine.

20 THE COURT: Have you had an opportunity
21 to read the guide I provided for you?

22 PROSPECTIVE JUROR: Yes.

23 THE COURT: And did you review your
24 questionnaire?

25 PROSPECTIVE JUROR: Yes.

1 THE COURT: Well, I know that's a lot of
2 law to give someone first thing in the morning. You don't
3 have to understand it all at this time. The attorneys will
4 visit with you about that and help you get up to speed and
5 understand how it all relates to the process that we're in
6 the middle of. There are no wrong answers, just honest and
7 truthful answers. The only question I have for you at this
8 time is will you be able to serve this Court for a period of
9 two weeks beginning on November 10th?

10 PROSPECTIVE JUROR: Yes.

11 THE COURT: Thank you very much.
12 Mr. Shook, would you like to inquire?

13 MR. SHOOK: Yes, Judge, thank you.

14 MICHELLE MELARA,
15 having been duly sworn, was examined and testified as
16 follows:

17 DIRECT EXAMINATION

18 BY MR. SHOOK:

19 Q. My name is Toby Shook. I'm going to ask you
20 questions on behalf of the State. And, as the Judge said,
21 there aren't any right or wrong answers. We just want your
22 honest opinions on these things, not a test of citizenship
23 or anything like that. We bring a whole lot of people down
24 from the panel, as you probably recall, because people feel
25 differently about capital murder, the death penalty, and

1 this type of case.

2 So, we just stress that you give us your
3 honest opinions, and if you have any questions at any time,
4 this is the time to ask, okay?

5 Now, reviewing your questionnaire, you
6 were born and raised here -- well, not born, but raised here
7 in Dallas; is that right?

8 A. Yes.

9 Q. And how are you employed?

10 A. Sonic Drive-in.

11 Q. Okay. What do you do with them?

12 A. I'm partial owner.

13 Q. Okay. What type of company is that?

14 A. It's a restaurant.

15 Q. Okay. And how often -- how many hours a week
16 are you working there?

17 A. Thirty-five, forty.

18 Q. Okay. What hours is it open?

19 A. What hours is the restaurant open?

20 Q. Uh-huh.

21 A. From 5:30 to 12:00.

22 Q. What if you were -- our trial date is in
23 November. If you -- and what we do is, the Judge, he runs a
24 pretty tight ship, whereas you'd be down here basically from
25 8:30 to 5:00 or so, or 9:00 to 5:00 during the week from

1 Monday through Friday. What -- as far as your work
2 situation goes, would you be able, then, to leave that and
3 concentrate fully on this case at that point in time, as the
4 owner of that business?

5 A. Um, I could. My partner wouldn't like it very
6 much, but I could.

7 Q. Okay. It's inconvenient, obviously, for
8 everyone. But we always run it by them, the fact that,
9 obviously, when we get the jurors down here, we have to have
10 them be able to concentrate on the evidence once you're down
11 here.

12 A. I understand.

13 Q. You feel you could do that?

14 A. Yes.

15 Q. Okay. Let's -- I want to talk to you about
16 your questionnaire just a little bit. I know it's been a
17 long time, so you probably don't remember your answers.

18 A. Yeah.

19 Q. But we like to follow up on some of them. And
20 one of the kind of openended questions we ask at the very
21 last on the last page is how you would feel being chosen as
22 a juror. And we get all kinds of different answers for
23 that. But you said thrilled. So I wanted to follow up with
24 that.

25 A. I was being more sarcastic because I was tired

1 of sitting in that room for three hours. I wouldn't mind
2 if, you know, I had to. But, I mean, like you said, it is
3 an inconvenience.

4 Q. Okay. So you were just kind of kidding around
5 a little bit?

6 A. I was being kind of sarcastic, yeah.

7 Q. All right. Also, talking about police
8 officers, you said that you -- the job's protecting the
9 community and you respected them for that, but you also had,
10 said sometimes they can be bossy and pushy. And I was
11 wondering if that came from any personal experience, some
12 kind of negative experience you had with a police officer?

13 A. Not really necessarily with me, just their
14 attitudes in general.

15 Q. Is that from observing them?

16 A. Yeah.

17 Q. Or any particular incident comes to mind?

18 A. Just hearsay, basically, and observing.

19 Q. Okay. Another question we ask is if the
20 criminal justice system fairly protects the rights of
21 persons accused of committing a crime. And we asked if you
22 agree or disagree or if you're uncertain, and you put
23 uncertain on that. And that means different things to
24 different people. What did you mean by that, if you recall?

25 A. Can you repeat that question?

1 Q. The criminal justice system fairly protects
2 the rights of the accused of committing a crime, the person
3 on trial.

4 A. I guess I put that because, you know, I'm not
5 up to date on the laws and, you know.

6 Q. Okay.

7 A. Everything, so --

8 Q. Let me ask you how you feel about capital
9 murder in general. Do you favor the death penalty as a law?

10 A. In certain cases, in certain circumstances.

11 Q. Okay. What types of cases do you favor the
12 death penalty?

13 A. I think if somebody went out and murdered
14 somebody on purpose and, I guess I'd say, a certain way,
15 then the death penalty should be.

16 Q. Brutal crimes?

17 A. Yes.

18 Q. That sort of thing?

19 A. Uh-huh.

20 Q. Have there been any cases you've followed in
21 the media that you thought were appropriate for the death
22 penalty, could be appropriate?

23 A. None that I can recall.

24 Q. Okay. If it were up to you, would you have
25 the death penalty for any crimes other than a brutal murder?

1 A. Um, probably not.

2 Q. Okay. In Texas the capital murder statute has
3 the death penalty reserved just for certain types of murder
4 cases, murders that occur during a felony like robbing a
5 clerk in a 7-Eleven, you shot the clerk, that could be a
6 death penalty case. During a burglary, during a rape,
7 kidnapping. Also, murder of a police officer on duty, a
8 fireman on duty, could be a death penalty case. Murder of a
9 child under the age of six, murder of more than one victim,
10 like a serial killer situation or mass murder. And then
11 murder for hire, someone does it for money. Those could be
12 death penalty type situations.

13 When we think of the death penalty, we
14 usually think of an example in our mind, you know, of the
15 actual triggerman. But in a capital murder situation, more
16 than one person sometimes commits that crime. You can have
17 accomplices. You can have one triggerman, but you may have
18 several people helping him at some point of the crime, just
19 like you can in any crime. Some may have a greater role
20 than others.

21 But the law says in a capital murder,
22 accomplices, if they are actively participating in the
23 crime, could actually be held accountable, found guilty, and
24 could even receive the death penalty, even though they
25 didn't actually cause the death.

1 An example we use, it's kind of a bank
2 robbery example. Let's say my partner and I, Mr. Wirsky,
3 decide we wanted to rob a bank. We go to the bank and I
4 have a gun and I go in there, and the plan is for me to
5 point the gun at the tellers, and while I hold them at bay
6 and get their hands up, he's going to run through with a
7 sack and load up the money.

8 During the middle of that robbery, I
9 start shooting and kill one of the tellers. Maybe I don't
10 like the way they're looking at me or he tells me one is
11 going for an alarm or something, and I intentionally murder
12 one of them. And we get caught.

13 Now actually, obviously, I could be
14 prosecuted for the death penalty. I could receive it. But
15 the law says he's my accomplice and if he's actively
16 involved, he, too, could be prosecuted, could be found
17 guilty of capital murder, could actually receive the death
18 penalty, depending on the facts.

19 But jurors feel differently about that.
20 We have some jurors that are for the death penalty, but if
21 it were up to them, they would reserve it only for the
22 actual triggerman in a case who caused the death. And for
23 the accomplice they might reserve a different type of
24 punishment, maybe a term of years in the penitentiary for
25 bank robbery or something like that. But they don't feel

1 it's fair to prosecute an accomplice for the death penalty,
2 since they didn't actually cause the death. They'd reserve
3 that punishment just for the murderer.

4 Other jurors feel differently. Some of
5 them feel, no, an accomplice should be prosecuted for the
6 death penalty and ultimately could receive it. But as the
7 Judge said, there aren't any right or wrong answers, and we
8 just kind of want to get your gut reaction to that.

9 How do you feel about the prosecution in
10 a death penalty situation on an accomplice, the
11 nontriggerman?

12 A. I think they should be tried separately. Not
13 with the death penalty, because he had intentions of robbing
14 the bank, and you did, too, at first. But you changed your
15 mind and went ballistic on the people, so.

16 Q. So from your personal point of view, you would
17 reserve the death penalty just for the actual triggerman?

18 A. Yes.

19 Q. Okay. And a lot of people feel that way.
20 That's why I kind of ask that openended question. And let's
21 say we could make you Governor for a day. First of all, if
22 you had the death penalty, you would reserve it only for the
23 actual triggerman; is that right?

24 A. Yes.

25 Q. And for an accomplice situation, you would

1 reserve some type of other punishment, prison time or
2 something, for that?

3 A. Yes.

4 Q. And is that something you feel pretty strongly
5 about?

6 A. Yes.

7 Q. Okay. And the reason I ask that that way is
8 you can disagree with parts of the law. You don't have --
9 that's why we kind of do this voir dire because some jurors
10 disagree. And if you can't follow or agree with certain
11 parts of the law and you feel strongly enough about it, then
12 that would just simply cause you not to be a juror on this
13 type of case. You could be a juror on another type of case
14 down the line.

15 And that's why we just want your honest
16 opinions. So, if we were prosecuting -- I can't get into
17 the facts. But if we were prosecuting this defendant as an
18 accomplice for capital murder, from your personal point of
19 view, that's just something you couldn't convict anyone of
20 if they're the nontriggerman and certainly couldn't consider
21 the death penalty for?

22 A. Well, like I said, he didn't have intentions
23 of killing anybody. But if there's a group together and
24 they have intentions of actually going to murder somebody
25 and they're all in on it, then I agree with the death

1 penalty for the accomplice. But he wasn't going in there to
2 kill somebody.

3 Q. Okay.

4 MR. SHOOK: Okay, Judge, I believe that's
5 all the questions we have.

6 MS. BUSBEE: Your Honor, we've reached an
7 agreement on this juror.

8 THE COURT: Ma'am, we thank you for
9 coming down. The parties have agreed to excuse you. You
10 will not serve as a juror in this case.

11 PROSPECTIVE JUROR: Okay. Thank you.

12 [Prospective juror out]

13 (Recess)

14 THE COURT: Ms. Cunningham, please.

15 [Prospective juror in]

16 THE COURT: Thank you. You may be
17 seated. Good afternoon. How are you?

18 PROSPECTIVE JUROR: I'm fine, thank you.
19 And yourself?

20 THE COURT: Doing pretty good. We've got
21 juror No. 2780, Ms. Carol J. Cunningham. Begs a question.
22 Any relations?

23 PROSPECTIVE JUROR: No, sir.

24 THE COURT: Where is your family from?

25 PROSPECTIVE JUROR: I was born in Odessa.

1 Have lived in Ft. Worth most of my life, went to school
2 there.

3 THE COURT: My family is from Paris on
4 the Cunningham side, so I don't believe we're related in any
5 way.

6 PROSPECTIVE JUROR: I know we're not.

7 THE COURT: Oh, okay. You have to know
8 in small towns, you could very well be related. We
9 appreciate you being here. You were No. 3 scheduled this
10 afternoon, but we take whoever comes in first, goes first.
11 So you probably saved about an hour and a half, two-hour
12 wait by being here early.

13 PROSPECTIVE JUROR: I was early.

14 THE COURT: Did you have enough time to
15 read the guide I gave you?

16 PROSPECTIVE JUROR: Yes, sir.

17 THE COURT: I also gave you a copy of
18 your questionnaire so you can begin to think about the
19 issues that we're going to be dealing with, refresh your
20 answers that you gave the Court back in May. And the
21 attorneys may want to follow up with you and explore a
22 little deeper your answers that you provided, so it's there
23 for you to refer to.

24 Please, ma'am, don't think you've got to
25 understand all the law right now. That's what this period

1 of time is for. The attorneys will visit with you, help you
2 understand how all this relates with what we're doing.
3 There are no wrong answers, just honest and truthful
4 answers. If you don't understand, we'll take as long as it
5 takes to get you to the point where you do understand what
6 the law is.

7 There are two questions I have to answer
8 at the end of the day. Number one is do you understand the
9 law? Number two, can you follow it? That's the big picture
10 I have to look at. Fair enough?

11 PROSPECTIVE JUROR: Yes, sir.

12 THE COURT: Is there any reason why you
13 cannot serve this Court for the period of two weeks
14 beginning on November 10th?

15 PROSPECTIVE JUROR: No reason.

16 THE COURT: Thank you very much.
17 Mr. Wirskeye, would you like to inquire?

18 MR. WIRSKYE: May it please the Court?

19 CAROL CUNNINGHAM,
20 having been duly sworn, was examined and testified as
21 follows:

22 DIRECT EXAMINATION

23 BY MR. WIRSKYE:

24 Q. Ms. Cunningham, how are you this afternoon?

25 A. I'm fine, thank you.

1 Q. My name is Bill Wirsky and I'll be the
2 Assistant DA that will be visiting with you for the next few
3 minutes. I know sometimes it's a little bit intimidating
4 because we bring you in and put you up on the witness stand.
5 But because this is a case where the State is seeking the
6 death penalty, the law allows us to talk to jurors
7 individually, and that's why we do it this way in the
8 courtroom. So to the extent possible, try not to feel like
9 you are on trial.

10 What I'd like to do is maybe follow up on
11 some of the information that you were kind enough to give us
12 in that long questionnaire that you filled out back in May,
13 talk to you a little bit about your thoughts and feelings
14 about the death penalty, and then maybe visit with you a
15 little bit about some of the laws and some of the rules that
16 apply in criminal cases, and more specifically death penalty
17 cases.

18 What went through your mind when you
19 found out that you had to come back for the individual
20 interview on a death penalty case?

21 A. I thought, oh, no.

22 Q. Why did you think that?

23 A. Well, I just, I couldn't believe I had been
24 selected for this portion of it.

25 Q. Okay. Why did you think that?

1 A. Because I guess I -- there was a question or
2 two in here that I did not fully understand, and I think I
3 specifically stated that. And I didn't know, I guess you
4 never know how you're going to come across to other people
5 when you answer things like this.

6 Q. Okay. What we do, you know, we had that big
7 group down with you. We had a morning group and an
8 afternoon group. The lawyers got together and read all the
9 questionnaires and we kind of came to an agreement on who
10 we'd actually talk to individually, someone that, at least
11 on paper, both sides thought could be a good juror for this
12 type of case. And so, in a sense you've already made one
13 cut to get to where you are. You've had a chance to look at
14 your questionnaire; is that right?

15 A. Yes, sir.

16 Q. Okay. What particular questions, going back
17 and looking at it, did you think you didn't understand or do
18 you remember which questions those were?

19 A. Let's see, the bottom of page 4.

20 Q. Okay.

21 A. In the law in the State of Texas is voluntary
22 intoxication does not constitute a defense to the commission
23 of a crime. Do you agree with this law and I said, yes.
24 And then I wrote, if a person voluntarily gets themselves in
25 this condition, they shouldn't be defended. I don't believe

1 I understand this question.

2 Q. Okay. Basically, it's not a defense. You
3 can't come into court if you commit a crime and say, hey, I
4 just did it because I got drunk, you know, voluntarily. I
5 was down voluntarily at the bar drinking beers. That's not
6 a defense to you being charged or convicted of a crime.
7 Does that make sense to you?

8 Somebody puts something in your drink or
9 slips you a Mickey or something, involuntarily intoxicates
10 you, that would be a defense, because, you know, you didn't
11 voluntarily choose to get drunk. But if you voluntarily do
12 it, it's not a defense to crime in Texas. Does that make
13 sense to you?

14 A. Yes.

15 Q. Okay. And that's something that sounds like
16 you agree with?

17 A. (Prospective juror nods head.)

18 Q. Or having a hard time or --

19 A. Well, I had checked yes and I agree with what
20 you said.

21 Q. Okay. Let me ask you this. You are an
22 administrative assistant; is that right?

23 A. Yes, sir.

24 Q. At Rockwell College?

25 A. Yes, sir.

1 Q. What do you do kind of on a day-in, day-out
2 basis?

3 A. I basically set up travel, monthly reports,
4 filing, just do whatever needs to be done.

5 Q. Okay. And exactly what type of business is
6 that? I've heard of it, but I'm not sure --

7 A. We're in the telecommunications business. We
8 do communications for the President's plane, Air Force One,
9 other types of, we deal with Lockheed and Boeing.

10 Q. Okay. Looks like you have three children; is
11 that right?

12 A. Yes, sir.

13 Q. And maybe a grandchild on the way or a new
14 grandchild?

15 A. She's three months old.

16 Q. Okay. Have you been to see her yet?

17 A. No, I have a flight set up for mid-October and
18 I've already checked with the bailiff about that.

19 Q. Okay. And you know we start -- if you're
20 selected as a juror, we would start the week of November
21 10th. So I wouldn't anticipate that would be a problem for
22 you.

23 Getting back to your questionnaire a
24 little bit. We always kind of ask people if they have had
25 any contact with the criminal justice system or known anyone

1 that's had any contact. I believe you indicated you had a
2 friend, a John Bryant?

3 A. Yes, sir.

4 Q. That back in the nineties, a savings and loan
5 type situation?

6 A. Yes, sir.

7 Q. What do you know about that?

8 A. He was like a surrogate father to my son. And
9 my son, Mark, and myself were called to be -- and there was
10 one other person, called to be a witness for the defense in
11 that case.

12 Q. Like a character witness type thing?

13 A. Yes, sir.

14 Q. Okay. Was that a -- do you know if it was a
15 state trial or a federal trial, or --

16 A. It was in Sherman. That's all I remember.

17 Q. Okay. How was that experience for you,
18 testifying as a character witness?

19 A. Well, it was my privilege to do that for my
20 friend and I certainly did believe in his innocence.

21 Q. Okay. Looks like the outcome of that charge
22 was he got probation?

23 A. Yes, sir.

24 Q. Okay. Has he successfully completed that
25 probation?

1 A. Well, he did and he did pass away about three
2 years ago from an aneurysm.

3 Q. Okay. It sounds like you believed he wasn't
4 guilty of that crime; is that right?

5 A. Oh, I don't believe he was with all my heart.

6 Q. Okay. How do you think he was treated in the
7 system? Do you think he was treated fairly, or --

8 A. The man that he was partners with, I believe
9 he had a -- he got a jail sentence. And my friend, John,
10 was given probation. So I guess in that light, he was
11 treated fairly. There were several hundred of us who did
12 write letters to the Judge expressing our concern about a
13 possible jail sentence for him.

14 Q. Okay. Having had that experience with
15 someone, I guess you obviously admired very much, how do you
16 think that might affect you, if you were to be a juror on
17 another case, a criminal case, having had that experience?

18 A. I don't see how it could affect me, because
19 these are -- that would be an entirely separate thing.

20 Q. Okay. Obviously, both sides, I think one of
21 our greatest fears is to get somebody over on the jury box
22 that kind of has maybe a hidden agenda or an axe to grind
23 with either side. So that's why we ask these type
24 questions. And you also mentioned your grandson, a great
25 grandchild, I believe had some kind of incident maybe over

1 like seven dollars or something?

2 A. Yes, something like that.

3 Q. Okay. Tell us about that, what you know about
4 that.

5 A. This is my daughter's son. From what I
6 understood he had come to my daughter and her husband's
7 house, had visited one evening and left around 10:00 or
8 11:00 that night. And he lives in Corsicana with his --
9 Streetman is the name of the city, with his dad.

10 And he was running -- he needed air in
11 his tires and he stopped to get air. And there was a money
12 box open and I guess the temptation was too great and he
13 reached in there. And the police happened to be there at
14 the same time. So I don't think we will ever understand
15 exactly what went on, but they did release him the next
16 morning.

17 Q. Okay. He didn't actually get charged or
18 convicted of anything that you know of?

19 A. I can't remember what it was.

20 Q. Okay.

21 A. But he did not break into the box.

22 Q. Something minor probably?

23 A. Yes, uh-huh.

24 Q. Okay. You've also been on a jury before, is
25 that right, I think you indicated?

1 A. This was one in Richardson years and years
2 ago. A woman had run a traffic light. She defended herself
3 and we did find her guilty.

4 Q. Okay. Also, looking at your questionnaire --
5 if you want to look at it, it's on page 5, I believe,
6 towards the top of the page. We kind of right under
7 criminal justice system, we asked you, what are your
8 feelings in general about the system? You said sometimes
9 it's unfair, but as imperfect people, we do the best we can
10 with our God-given abilities.

11 I was just wondering if sometimes unfair,
12 does that come from your experience with your friend,
13 Mr. Bryant, or some other episode or experience you've had?

14 A. I think it's just different things that I have
15 heard or read about, even though I've had no proof of what
16 the verdict should have been. It's just from different
17 things you hear from different people.

18 Q. Okay. Innocent people getting convicted or
19 guilty people being let go?

20 A. Yes, both.

21 Q. Okay. Both ways?

22 A. Uh-huh.

23 Q. Let me ask you, you told us, I guess,
24 generally you're in favor of the death penalty for certain
25 crimes?

1 A. Yes.

2 Q. Why do you feel we should have a death penalty
3 available as an option in certain cases?

4 A. I believe people need to be punished for the
5 crimes that they commit and sometimes that is the only way
6 to punish people.

7 Q. Okay. When you think about an appropriate
8 type of case for the death penalty, you know, a situation or
9 a set of facts that sounds appropriate for the death
10 penalty, what comes to mind?

11 A. I always remember that Charles Manson. I
12 think he's still alive, but --

13 Q. I think he is still locked up. Are there any
14 other cases that come to mind that you may have heard about
15 or read about, following the media?

16 A. I can't think of any offhand.

17 Q. Okay. Kind of we asked you to rank yourself
18 on a scale of 1 to 10 how strongly you feel, you know, about
19 the death penalty and you gave yourself a 9, which is kind
20 of towards the high end. But we know it means different
21 things to different people. And I was just kind of curious
22 what your thought process was when you kind of assigned
23 yourself that No. 9?

24 A. I just, I believe in the death penalty, if
25 it's needed. It needs, we need to follow through with that.

1 And I think it could in some ways be a deterrent for other
2 people.

3 Q. Okay. In Texas, as you may have read in that
4 packet of law that the Judge gave you, we reserve the death
5 penalty just for murder cases and then only certain types of
6 murder cases. There are some sorts that are very brutal and
7 very bad murder cases where a person could get up to life in
8 prison, but the death penalty is not an option.

9 We reserve it for cases where a
10 particular person is killed, a child under six, a police
11 officer or fireman during the course of their duties, or
12 intentional murder that's committed during the course of
13 another felony like robbery, burglary, rape, that type
14 thing, or mass murder, serial murders, those type
15 situations. But that's the kind of the set of crimes we
16 limit the option of a death penalty for in Texas. Is that
17 something that you generally agree with?

18 A. Yes.

19 Q. That set of crimes?

20 A. Yes.

21 Q. Okay. And let me ask you this question. I
22 know a lot of people sometimes haven't given this some
23 thought, but you kind of mentioned it in your questionnaire.
24 Sometimes when we talk to people, even people that are, you
25 know, strongly in favor of the death penalty, people tend to

1 draw some lines sometimes in the type of cases where they
2 feel it's appropriate.

3 What I mean by that is this. You know,
4 oftentimes crimes are committed by more than one person. A
5 group of individuals can commit a crime. And the law allows
6 us to prosecute everyone that's actively involved in a
7 crime, actively participates in a crime, whether it be
8 shoplifting all the way up to capital murder. And
9 frequently when you're talking about a capital murder, you
10 may have a situation where just one person actually pulls
11 the trigger with a gun, let's say. One person actually
12 causes the death of the individual.

13 But you may have other, I think you used
14 the word, people commonly know it as accomplices. You may
15 have a set of accomplices who didn't even actually cause the
16 death, they could still be found guilty of capital murder
17 and may ultimately face the death penalty.

18 And some people we talk to, if it were up
19 to them, you know, they may feel very strongly in favor of
20 the death penalty for the triggerman, the guy that pulled
21 the trigger. But if it was up to them, they wouldn't have
22 the death penalty available as an option for those
23 accomplices. For whatever reason, religious, moral, or
24 ethical, they just don't feel a death sentence would be
25 justified for those accomplices that didn't actually take

1 the life.

2 And some people feel differently, you
3 know. They would keep that option available for both the
4 triggerman or the nontriggerman. Where do you kind of come
5 down on that issue?

6 A. Well, I don't know if this is a valid reason
7 or not, but if you accompany somebody who does pull the
8 trigger, to me you are equally as capable of doing that,
9 even though you may not have done it at that time.

10 Q. Okay. So, you wouldn't automatically take the
11 death penalty off the table for the accomplice, the person
12 that didn't actually cause the death. Is that kind of what
13 I hear you saying?

14 A. Right, yes, sir.

15 Q. Okay. And that's pretty much what the law is.
16 In fact, I think, you know, when you think about the Charles
17 Manson case, you know, he didn't actually kill anyone, he
18 just had people do it, I guess, at his direction. And the
19 law in Texas allows, depending on the facts and
20 circumstances, for both the triggerman and the accomplice to
21 ultimately maybe face the death penalty.

22 Let me give you an example of that and
23 see if it makes sense to you. Let's say Mr. Shook and I
24 decide we're going to rob a bank. And the plan is for
25 Mr. Shook to take the gun in and hold up the tellers. While

1 he's doing that, I'm going to go in with a bag. I'm not
2 going to have a gun, but I'm going to go in with a bag and
3 kind of collect all the money out of the cash drawers. And
4 that's our plan to rob the bank.

5 Let's say when we go in there, for
6 whatever reason, Mr. Shook intentionally shoots and kills
7 one of those tellers. Maybe one of them looked at him funny
8 or I saw one of them going for the silent alarm and I tell
9 him that, but he shoots and kills someone. Now, he's
10 committed an intentional murder during the course of a bank
11 robbery which, you know, is capital murder.

12 He could be convicted of capital murder
13 and ultimately sentenced to the death penalty. Again, the
14 law in Texas is that me, the accomplice, I, also, could be
15 convicted of capital murder and potentially face the death
16 penalty. What do you think about that?

17 A. It's the same scenario that you just gave me.

18 Q. Okay.

19 A. The same rule applies.

20 Q. You could see, depending on the facts and
21 circumstances, maybe convicting me of capital murder --

22 A. Yes.

23 Q. -- as the accomplice and potentially giving me
24 a death sentence?

25 A. Yes, sir.

1 Q. Okay. And that's basically what the law is.
2 You know, if I aid or assist or direct Mr. Shook to commit
3 capital murder, kind of like Charles Manson did, I'd be just
4 as guilty and could face the death penalty.

5 Or, under the law of conspiracy, the
6 second way an accomplice could be found guilty, is if
7 Mr. Shook and I conspire, which means just agree to commit
8 that bank robbery, and during the bank robbery somebody gets
9 killed, the law says if I should have anticipated that that
10 death would have occurred, that I could be found guilty of
11 capital murder. Does that make sense?

12 A. Yes, sir.

13 Q. And a lot of people say, you know, I should
14 have anticipated somebody get killed because my partner took
15 in a loaded gun to the bank robbery, that kind of thing.
16 Does that make sense to you?

17 A. Yes, sir.

18 Q. Okay. Let me ask you this. I think, like
19 almost everybody we talk to, you indicated on the
20 questionnaire that you had heard at least something about
21 this case, this particular case we're here on?

22 A. Yes, sir.

23 Q. Could you tell us what you remember hearing
24 about this case?

25 A. The only thing I remember is that, it was on

1 television, that's where I heard about it. It happened in
2 Irving, I believe. And, what was it, a year or two later I
3 think they were found in Colorado. And that's all I know
4 about it.

5 Q. Okay. Sounds like you don't have a lot of
6 knowledge of the details or the crime allegations?

7 A. No. In May after I had been up here, I
8 certainly was curious enough. I went to my computer and
9 pulled up the Texas Seven and --

10 Q. A lot of people did that.

11 A. I did see a picture of him and there was a
12 little writeup there.

13 Q. Okay. What do you remember reading from the
14 Internet?

15 A. About the only other thing I remember about
16 that was it seems like that he had a history of previous
17 offenses, and I can't remember what they were.

18 Q. Okay. Having kind of gotten that additional
19 or extra knowledge about, I guess the case, and about Mr.
20 Murphy in specific, how do you think that may affect you, if
21 you were to be a juror on this case?

22 A. I don't think that would have any bearing on
23 the case.

24 Q. Okay. What the law requires is that, even
25 people such as yourself, who may have heard or read or seen

1 things about the case, even people who may have, you know,
2 developed some opinions or formed some impressions, as long
3 as they can kind of put that aside and not necessarily
4 forget it, but put it aside and be able to assure the Court
5 that they can base their verdict just on the testimony they
6 hear in the courtroom, they would be a qualified juror.

7 And honestly some people tell us, you
8 know, I know too much about the case and I know too much
9 about the individual. I'm just not sure I could do that.
10 Other people say, you know, I could do that, just base my
11 verdict on what I hear in the courtroom. Do you think you'd
12 be able to do that?

13 A. Put it aside? Yes.

14 Q. Okay. We talk, like I said, talked to quite a
15 few people, some that feel very strongly about the death
16 penalty. We realize that a lot of people kind of, you know,
17 being philosophically in favor of the death penalty, being
18 in favor of the death penalty in the abstract, is something,
19 you know, quite different than when you actually come down
20 here as a juror and you are at this point in the process,
21 and you are actually looking at the lawyers and looking at
22 the defendant and you kind of understand, you know, the
23 State's goal in this case.

24 Very frankly, that is our goal. We feel
25 we have the nature, the type, and the quality of evidence

1 that's going to cause a jury to find him guilty of capital
2 murder and answer those Special Issues in such a way that
3 he'll ultimately receive the death penalty and it would
4 ultimately be carried out.

5 And we know that's just not everyone's
6 cup of tea sometimes. They may be strongly in favor of the
7 death penalty philosophically, but when it gets to this
8 point, they become a little unsure whether they're the type
9 person that they feel in their heart of hearts could
10 actually participate in this type of process. You know,
11 some people tell us, you know, details of executions are
12 often reported in the media, on the TV, in the paper.
13 Living in Texas, you know that this is a state where the
14 death penalty is assessed by jurors. It's carried out.
15 Texas frequently leads all the states in the numbers of
16 executions from year to year. The death penalty is a
17 reality in this state.

18 The procedures are the same in any case.
19 They'd be the same in this case. If he was sentenced to
20 death, he would be taken immediately down to death row where
21 he would wait for some period of time. I can't tell you how
22 long or when it would be, but at some point Judge Cunningham
23 would issue a date of execution. And on that date he would
24 be moved from death row down to the main prison in downtown
25 Huntsville where he would be kept in a little holding cell

1 right outside the death chamber.

2 And on that last day, he would be given a
3 chance for a last meal. He would be given a chance to meet
4 with friends, family members, spiritual advisors. But as
5 the clock got down towards 6:00 in the afternoon, which is
6 the time that all executions in Texas are carried out, he
7 would be moved from that holding cell right down the hall to
8 the death chamber, either voluntarily or involuntarily,
9 if he didn't want to go.

10 You may have seen pictures on the media
11 of that death chamber. It's got the gurney with the leather
12 straps on it. But he would be taken there, strapped down
13 against his will, if need be, with those leather straps. An
14 IV would be started in his arm. There would be witnesses
15 there from his side and also be friends, family members, of
16 the victim there to witness the execution.

17 The warden would give him several minutes
18 to make a last statement. He may, you know, confess his
19 guilt and beg for forgiveness, or he may proclaim his
20 innocence up to the very last.

21 But at some point after the last
22 statement the warden would signal to the executioner and the
23 executioner would release different chemicals into that IV
24 that would very quickly stop his heart and lungs and he
25 would eventually lose consciousness, fall into a deep coma,

1 and eventually die.

2 I go through that not to be morbid with
3 you, but those are the type of details that are often
4 reported when you talk about executions. And some people
5 tell us, very frankly, again, I don't think I'm cut out for
6 this. I don't want that weighing on my mind. You know, I
7 may be a good juror in a different type of case, but not a
8 death penalty case. Even though I believe in it
9 philosophically, at this point I'm just uncomfortable
10 participating in the process.

11 And we kind of leave it up to the
12 individual, because you know yourself better than anyone.
13 But I want to make sure, before we go any further, that you
14 feel like you are the type of person that could take pen in
15 hand and answer these three questions that you'd be asked to
16 answer and answer them in such a way that may lead to the
17 execution of another human being. Do you feel like you are
18 the type person that could participate in that process?

19 A. Yes, sir.

20 Q. Okay. Why do you feel that way?

21 A. I just -- I just have strong convictions about
22 that. It's not an opinion that I have, but a conviction. I
23 think life is very precious. But there are consequences to
24 all of our actions and it's just the way I feel about it.

25 Q. Okay. Fair enough. Let's talk a little bit

1 about some of the procedures. All criminal cases in Texas,
2 even a death penalty case, the trial is basically broken
3 down into two different parts. The first part of the trial
4 we call the guilt/innocence phase. And that's where the
5 jury would get to hear just the facts and evidence generally
6 surrounding the crime.

7 And we ask the jury to make a decision
8 whether the person is guilty or not guilty at that point,
9 basically, whether the State proved to you beyond a
10 reasonable doubt that he's guilty of capital murder. If we
11 do that and he's found guilty of capital murder, then in a
12 sense that second stage starts, or that second phase of the
13 trial.

14 The rules of evidence broaden out. You
15 get to hear a little more details about his past, good or
16 bad, his criminal history, if it exists, character witnesses
17 like that, that type of thing, if they exist. And we
18 basically ask a jury in that second phase of the trial to
19 answer these three questions. I know you looked at them in
20 your packet, but there's these three questions up on the
21 wall.

22 And we kind of let the answers to those
23 questions, or we do let the answers to those questions,
24 determine what the proper sentence is. We don't ask a jury
25 to write in a life sentence or write in a death sentence.

1 We just ask the jury to kind of look at these questions and
2 answer them and see what the evidence is. Does that make
3 sense to you, kind of the process that we have?

4 A. Yes, sir.

5 Q. Okay. If you'd take a second and just,
6 they're phrased a little bit differently up on the wall,
7 take a second and just read through those three questions
8 real quick so we can talk about those.

9 A. (Prospective juror complies.)

10 Q. Did you get a chance to look at all those?

11 A. Uh-huh, yes, sir.

12 Q. Okay. Again, these are the questions that we
13 ask a jury to answer at the end of that second phase, after
14 they've heard all the evidence in the second phase of the
15 trial. And you can go back and look at the evidence you
16 heard in the first phase with any additional evidence to
17 help you answer those questions.

18 Kind of what the law contemplates,
19 though, is a juror being able to start the second phase kind
20 of with no preconceived notions. That is, they can't start
21 that second phase and kind of automatically answer any of
22 these questions. We kind of ask a jury to, even though they
23 convicted someone of capital murder, to keep that open mind
24 in the second phase of the trial. Does that make sense to
25 you?

1 A. Yes, sir.

2 Q. Okay. The first Special Issue, or I just call
3 them questions, kind of deals with the situation what we
4 call the future danger question. We ask a juror if there's
5 a probability that the defendant would commit acts of --
6 criminal acts of violence, such that they would be a
7 continuing threat to society. You kind of see how that
8 question asks you to make a prediction about the future? Is
9 that something you think you could do --

10 A. Yes, sir.

11 Q. -- given enough information?

12 A. Yes, sir.

13 Q. What type of information would be important to
14 you in answering that question?

15 A. It would probably be -- it might have to do
16 with his background in that and into No. 3.

17 Q. Okay. That's frequently what we hear, the
18 background. You said also No. 3. What did you mean by
19 that?

20 A. The background, his character and background.

21 Q. Okay. Certainly you can consider that when
22 you get down to question 3 as well. But if you have that
23 sort of information, that background, do you feel
24 comfortable answering Special Issue No. 1?

25 A. Yes, sir.

1 Q. Okay. A lot of the phrases that we get or
2 words that we get in this phase of the trial are not
3 defined. So we kind of leave it up to jurors to use their
4 good common sense what words and phrases mean to them. See
5 that word "probability" in that first question?

6 A. Yes.

7 Q. What does that mean to you, "probability"?

8 A. A chance, maybe a good chance.

9 Q. That's what people tell us, good chance, or a
10 likelihood, or more likely than not, that type of thing.
11 Does that make sense to you?

12 A. Yes, sir.

13 Q. The law says, obviously, it can't be a
14 certainty, because we could never prove anything to you as a
15 certainty. But it's got to be something more than just a
16 possibility, because anything is possible. So a lot of
17 people, more likely than not, or a good chance, sounds like
18 what you're comfortable with.

19 A. Yes, sir.

20 Q. In that middle sentence, you see that
21 "criminal acts of violence," that phrase?

22 A. Yes, sir.

23 Q. What type of acts or crimes come to mind when
24 you look at that phrase?

25 A. Murder.

1 Q. Anything else? Any other types of crimes,
2 criminal acts of violence, assaults, or rapes, or that type
3 thing?

4 A. Yes, sir.

5 Q. Okay. Again, there's no definition. The law
6 says we don't necessarily have to prove to you that he's
7 going to be involved in another capital murder or that he's
8 going to kill someone. It's just anything that the jury
9 thinks constitutes criminal acts of violence, that type
10 thing. Does that make sense to you?

11 A. Yes, sir.

12 Q. Okay. And, finally, the last word in that
13 sentence, we have "society." What do you think of when you
14 think of "society"? Or how would you define that?

15 A. Mankind.

16 Q. Okay. Everyone or anyone that he may come
17 into contact with?

18 A. Yes, sir, general populace.

19 Q. Okay. And what about the population behind
20 bars, other inmates, guards?

21 A. Yes, sir.

22 Q. Okay. Special Issue No. 1 and Special Issue
23 No. 2 are similar in the sense that they both start out with
24 a no answer, okay? That's kind of a default setting on
25 those questions. Starting out, the answer is no, and a jury

1 can only answer them yes, if the State proves to you beyond
2 a reasonable doubt that the answer should be yes. Does that
3 make sense to you?

4 A. Yes, sir.

5 Q. It's part of our burden of proof to prove it
6 to you that he be that future danger. If we don't do that
7 to you, the answer stays no. Does that make sense?

8 A. Yes, sir.

9 Q. And, again, the law requires that you kind of
10 start looking at these Special Issues with an open mind.
11 You know, some people tell us, very frankly, hey, you know,
12 if I have convicted someone of capital murder, my mind is
13 kind of closed to Special Issue No. 1, because I'm
14 automatically always going to think that the answer to that
15 should be yes. I'm always going to think they are a future
16 danger.

17 And there's a certain amount of common
18 sense to that. But what the law envisions, again, is the
19 jurors have that open mind. Even though you may have
20 convicted him of capital murder, you step back, take a deep
21 breath, look at all the evidence, what you heard in the
22 first phase, what you heard in the second phase, and answer
23 that question. Does that make sense to you?

24 A. Yes.

25 Q. Is that something you think you could do, keep

1 an open mind to these questions?

2 A. Yes, sir.

3 Q. Okay. Special Issue 2, again, starts out no.
4 We've got to prove it to you the answer should be yes. And
5 this question kind of deals with that situation we've
6 already talked about, Ms. Cunningham, I guess where more
7 than one person or accomplice is involved. And there's
8 really three parts to that question.

9 If you find the defendant actually caused
10 the death of the person, you know, that they were the
11 triggerman, you answer it yes. If you think that they
12 intended to kill the deceased or another, but didn't
13 actually do it, then you'd answer the question yes. Or,
14 kind of the scenario we've been talking about, that last
15 line, if you find that they anticipated that a human life
16 would be taken, you would answer that yes. Does that kind
17 of make sense to you?

18 A. Yes, sir.

19 Q. Okay. And if you'll remember, in order to
20 convict someone of capital murder, an accomplice, like in my
21 example, the jury would have to be convinced that I should
22 have anticipated that a life would be taken, okay? That's
23 the standard to find somebody guilty of capital murder.

24 When you go to this second phase of the
25 trial, the law says the standard is a little bit higher.

1 And the standard in the second phase of the trial is, you
2 know, is more than should have anticipated, it's actually
3 anticipated. Did the person actually anticipate that a
4 human life would be taken? It's kind of a little bit higher
5 standard before we can get to the death penalty. Does that
6 make sense to you?

7 A. Yes, sir.

8 Q. Okay. You kind of see that distinction
9 between should have anticipated and did anticipate?

10 A. Yes, sir.

11 Q. Quick example, I think I tell some people
12 sometimes. I got my first car when I was 16 years old. My
13 dad gave it to me and I drove it like a madman for about a
14 month. And, of course, I finally ended up wrecking it
15 within about a month. My dad was real mad and he said, you
16 know, boy, you should have known, you should have
17 anticipated driving it that way, that you were going to
18 wreck it.

19 And he was right, I should have. But I
20 never actually did, because I was just too young and too
21 stupid. Even though I should have anticipated, I didn't
22 actually anticipate. I think that's kind of one example
23 that points to that different standard. Does that make
24 sense to you?

25 A. Yes, sir.

1 Q. Okay. And you would only answer that yes, if
2 we prove it to you that the answer should be yes. Then,
3 finally, moving to that last question, Special Issue No. 3.
4 This is kind of what we call the mitigation question. It's
5 the last stop in the process. It's kind of a safety net
6 when you're talking about a death penalty case.

7 It's a little bit different than the
8 first two questions. Neither side has the burden of proof
9 on that question. It doesn't start off with a no answer.
10 We just kind of leave it up to the jurors to answer it as
11 they see fit. But this question asks you to step back, take
12 a deep breath, look at everything you've heard, the facts of
13 the crime, you know, what you know about his background, his
14 past, his character, and look at what sort of personal moral
15 blame he bears in what happened.

16 And ask yourself, is there anything
17 mitigating? Is there anything that lessens his personal
18 blame for the crime? And if there is, is it sufficient that
19 his life ought to be spared, that he ought to be given that
20 life sentence instead of a death sentence? Does that make
21 sense to you?

22 A. Yes, sir.

23 Q. Okay. You kind of see why we have that
24 question? I guess it's a chance for a jury to show mercy,
25 if they feel it's appropriate.

1 A. Yes, sir.

2 Q. Okay. Do you think that's a valuable question
3 to have?

4 A. Yes, sir, I do.

5 Q. Even at that late stage of the process?

6 A. Yes, I do.

7 Q. And some people tell us, you know, if I've
8 convicted a person of capital murder, if I think they're a
9 future danger, if I think they anticipated a life would be
10 taken, there's never going to be anything that would cause
11 me to answer that last question no. You know, there's never
12 going to be anything mitigating. And their mind wouldn't be
13 open to it at that point. They wouldn't be qualified. But
14 from what you're telling me, you would go into that third
15 question with an open mind?

16 A. Yes, sir.

17 Q. Okay. As you sit there right now, is there
18 anything that comes to your mind that might be mitigating
19 when you think about a death penalty case?

20 A. And you mean by the term "mitigating" --

21 Q. Mitigating would be something -- it's not
22 defined, but the Courts have given us some guidance. It
23 would be something that would lessen his personal moral
24 blameworthiness. It's kind of the opposite of aggravating.
25 I mean, you know, I guess something especially bad would be

1 aggravating. Something mitigating would be the opposite end
2 of that spectrum. Does that make sense to you?

3 A. Yes, sir.

4 Q. Okay. Could you think of anything that might
5 be potentially mitigating?

6 A. Not off hand.

7 Q. Okay. That's the most common answer we get,
8 Ms. Cunningham. Don't feel bad. We hope the people don't
9 sit around thinking about these type of things in their
10 normal life. And that, you know, the law doesn't require
11 that you tell us what you think is mitigating. The law
12 doesn't require that you consider any particular factor
13 mitigating. The law just requires that you kind of keep
14 that open mind and if you hear something that you think is
15 mitigating, you'll consider it and give it the weight that
16 you think is appropriate. Does that make sense to you?

17 A. Yes, sir.

18 Q. Some people have told us, you know, maybe a
19 person's background as a child. You know, how they were
20 raised, if they had mental abuse, physical, emotional abuse,
21 that type thing, that may be potentially mitigating. Other
22 people tell us, no, that's not really mitigating. You kind
23 of at some point you get old enough to be responsible for
24 your actions and get past whatever may have happened to you.
25 How do you kind of fall down on that issue?

1 A. I can see both sides of that. I can
2 understand why a background would be detrimental, a bad
3 background could be detrimental to a child's good potential
4 growth and development.

5 Q. Okay. Some people tell us maybe a person's
6 age. You know, if they were very young when they committed
7 the crime, that may be mitigating. Just to let you know, I
8 know you've read the questionnaire, and we don't tell you
9 what the age is, but you have to be 17 years or over in
10 Texas in order to receive a death sentence.

11 So we're talking, you know, maybe young
12 people, 17, 18, 19, 20. Some people think that young age
13 may be mitigating. And, again, the opposite end of that
14 spectrum, some people say, you know, you're old enough to
15 make your own decisions. You've got to face the
16 consequences and that is not mitigating. Where do you kind
17 of fall on that issue?

18 A. On that issue I don't feel like age is an
19 excuse.

20 Q. Okay.

21 A. Seventeen is old enough to know right from
22 wrong.

23 Q. Okay. Any questions about kind of the scheme
24 that we have or the three questions we ask you in
25 punishment?

1 A. No, sir.

2 Q. Okay. Do you kind of see how it works? We
3 let the answers determine the sentence and keep that open
4 mind all the way through and wouldn't prejudge or
5 automatically answer any of these questions just based on
6 what you heard in the first part of the trial or that type
7 thing. That make sense to you?

8 A. Yes, sir.

9 Q. Okay. Let me talk to you a little bit about
10 maybe some of the types of witnesses that you will hear
11 from. Obviously, we've alleged a police officer has been
12 killed. You know this is a criminal case. You can probably
13 expect to hear from police officers in this case.

14 And a lot of people admire the work they
15 do and think highly of them. But what the law says is if
16 you are a police officer and you are a witness, that they
17 have to start off with kind of that same level of
18 credibility. A juror can't give a police officer witness a
19 leg up, just for the simple fact that he's a police officer.
20 Does that make sense to you?

21 A. Yes, sir.

22 Q. Okay. Is that a law you think you can follow?

23 A. Yes, sir.

24 Q. Okay. You may also hear from a psychiatrist
25 or psychologist. Typically sometimes in these cases they

1 testify for the defense or maybe even for the State or both,
2 to try to give the jury some guidance to answer, you know,
3 question No. 1 or question No. 3. And we kind of hear all
4 sorts of answers about how people feel about those type of
5 people, psychiatrists or psychologists. I think -- is your
6 daughter a school psychologist?

7 A. Yes, my baby is.

8 Q. Okay. What do you think about those type
9 witnesses?

10 A. I would have no problem with any of that.

11 Q. Okay. You could keep an open mind?

12 A. Yes.

13 Q. And listen to their testimony?

14 A. Yes, sir.

15 Q. Some people tell us, you know, my mind is
16 closed. I just don't believe in that stuff. And kind of
17 the opposite end of the spectrum, people say, you know, I
18 believe every word out of their mouth, you know. They're
19 great people and never give a bad opinion, that type thing.
20 So we kind of want somebody in the middle. Is that kind of
21 where you fall?

22 A. Yes.

23 Q. Okay. Just some general things that apply in
24 any criminal trial. You're probably familiar with a lot of
25 this. A person is always presumed innocent, the defendant.

1 It's always our burden to prove to you he's guilty and prove
2 to you those two answers. This table, the defense, never
3 has a burden. They don't have to do anything. You can
4 never look to them for proof in a criminal case.

5 As a part of that, a person has a Fifth
6 Amendment right not to testify. No one can force a person
7 to testify in their own defense. A lot of times, obviously,
8 people want to hear from a person charged. But the law says
9 that, if a person chooses not to testify, the jurors
10 couldn't hold that against them in any way. They just
11 couldn't consider it in their deliberations. Does that make
12 sense to you?

13 A. Yes, sir.

14 Q. Okay. And you can follow the burden of proof,
15 the Fifth Amendment, that type thing?

16 A. Yes.

17 Q. Okay. Also, let me talk to you a little bit
18 about what a life sentence means. You know, you've heard
19 some talks about the parole laws, I'm sure, in Texas, and
20 when a person is eligible or when he gets paroled. In
21 Texas, in a capital murder, if a person doesn't get death,
22 if they get that life sentence, the person must serve forty
23 years, day for day, before they become eligible for parole.

24 Now, they may make parole right at that
25 40-year mark, or they may never make parole and actually end

1 up doing a life sentence. Because those decisions are so
2 far in the future and beyond the control of anybody in this
3 courtroom, we ask a juror to kind of presume that a life
4 sentence means an actual life sentence. Does that make
5 sense to you?

6 A. Yes, sir.

7 Q. Is that something you think you could do?

8 A. Yes, sir.

9 Q. Okay. Also, let me talk to you a little bit
10 about the elements of the crime. As part of our burden of
11 proof, we've got to prove to you each and every element of
12 the crime. And, basically, that is that a certain person on
13 or about a certain day in a certain county killed a certain
14 person in a certain way, okay?

15 And we have to prove all of that to you.
16 We've got to have 100 percent batting average or thousand
17 percent batting average. We can't miss one. We don't get
18 partial credit. If we only prove nine out of the ten,
19 you've got to find the person not guilty. And the law says
20 that one element is no more important than another element.
21 Does that make sense to you?

22 A. Yes, sir.

23 Q. Okay. And you think that's a law you can
24 follow?

25 A. Yes, sir.

1 Q. Just to give you kind of a far out example of
2 that, say we try a capital murder case that happened in
3 Grand Prairie. Some of Grand Prairie is in Tarrant County
4 and some is in Dallas County. And we allege as an element
5 of the crime that that capital murder happened in Dallas
6 County. The police didn't do their job, the DA's Office
7 didn't do their job.

8 When we get down here to trial, the
9 evidence shows it actually happened in Tarrant County, okay?
10 We would have missed an element of the crime. And under the
11 law, because one element is no more important than another,
12 the jury would be required to find the person not guilty,
13 because we missed that element.

14 A lot of people aren't happy about it. A
15 lot of people think it's a technicality. But that's kind of
16 the mental discipline that it requires to be a juror. And I
17 guess one way to look at it is one person's technicality is
18 another person's constitutional right. Does that kind of
19 make sense to you?

20 A. Yes, sir.

21 Q. I don't expect that to ever happen. It's kind
22 of a far out example. But I think it illustrates the point
23 that we've got to prove each element. And it sounds like
24 that's a law that you believe you could follow?

25 A. Yes, sir.

1 Q. Okay. Finally, there's these things called
2 lesser included offenses. I don't know if they're going to
3 come up in this case, but we kind of have to talk about
4 them. And just to give you an example of what a lesser
5 included offense is, let's say we allege that somebody
6 committed an intentional murder during the course of a
7 robbery.

8 And at the end of the evidence in that
9 first phase of the trial you have a reasonable doubt about
10 whether they committed the murder, but you think they
11 committed the robbery, okay? You might have an option to
12 find that person guilty of the lesser included offense of
13 aggravated robbery, because you don't believe they
14 necessarily did the murder. Does that make sense to you?

15 A. Yes, sir.

16 Q. If that happens you would throw out this whole
17 scheme with the questions, and the law would just ask you to
18 set whatever you believe an appropriate sentence to be,
19 somewhere between five years all the way up to 99 years or
20 life, wherever you think is appropriate in that range. The
21 law just requires that you keep that open mind to the entire
22 range of punishment. Does that make sense to you?

23 A. Yes, sir.

24 Q. Okay. Is that something you think you can
25 keep an open mind to, that range of punishment?

1 A. Yes.

2 Q. Okay. We've covered quite a bit pretty fast.
3 You probably feel like you've had a day in law school with
4 all this talk. Any questions that you have about anything
5 that we've covered, Ms. Cunningham?

6 A. I can't think of any right now.

7 Q. Okay. Again, the bottom line is just, we're
8 looking for jurors that can keep that fair and open mind and
9 be qualified. You know, don't do anything automatically or
10 have any preconceived notions, that type of thing. I
11 appreciate your time. Thank you very much.

12 MR. WIRSKYE: That's all I have, Judge.

13 THE COURT: Mr. Sanchez.

14 MR. SANCHEZ: Thank you, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. SANCHEZ:

17 Q. How are you doing, Ms. Cunningham?

18 A. I'm fine, thank you.

19 Q. Good. Are you tired of talking up there and
20 answering questions?

21 A. Well, I think he's done most of the talking.
22 I'm in pretty good shape, I think.

23 Q. Okay. Well, that's why I'm going to ask you
24 to talk when I ask you questions. And he's given you the
25 law and you pretty much said you could follow it, but I want

1 to know your feelings about the law, because sometimes we
2 have feelings that conflict with the way the law is written
3 or with the way we expect somebody to follow the law. And
4 those conflicts will affect us in being a fair juror in
5 certain cases, okay?

6 You have indicated that you have strong
7 feelings for the death penalty, and the reason I'm going to
8 ask you all these questions is because, you know, we have
9 some people that come in here and they can't wait to get on
10 the jury and give somebody the death penalty. Well, you
11 know, somebody like that may not be a fair juror because
12 he's already made up his mind what he wants to do. Or he
13 would, you know, act in a way that's contrary to the capital
14 murder scheme, the way it's been explained to you.

15 We have other people who come in here and
16 they, you know, they just couldn't give the death penalty in
17 any situation. Well, somebody like that is really not
18 qualified because they can't give both sides a fair trial.
19 So, you know, I want to get your feelings on what you think
20 about all these laws that have been explained to you and
21 then you let me know whether, you know, you have a problem
22 with them and whether that would affect you some way, okay?
23 Is that fair enough?

24 A. Yes, sir.

25 Q. You indicated earlier that, you know, you feel

1 that people need to pay for their actions. And you also now
2 learned that the way the death penalty scheme is laid out,
3 that it favors a life sentence rather than a death penalty
4 sentence, unless the State can prove their case beyond a
5 reasonable doubt that they're even guilty of capital murder.
6 And then they prove Special Issue No. 1 and No. 2 to you
7 beyond a reasonable doubt.

8 What do you think about that? What do
9 you think about the fact that the first choice is really not
10 the death penalty and that it's a life sentence is really
11 the first choice, unless they can prove those issues to you
12 beyond a reasonable doubt? What do you think about that?

13 A. Well, if it's capital murder, I think the
14 death penalty should be given.

15 Q. Okay. So, in your mind is the death penalty,
16 should that be the first choice in your mind, if you find
17 somebody guilty of capital murder?

18 A. It might be my first choice, but I would have
19 to take into account the Special Issues.

20 Q. Okay. Okay. And, but in your mind would you
21 already be -- would you already have those questions
22 answered in a way that the death penalty would result and
23 then maybe somebody would have to prove to you why that
24 person should receive a life sentence instead of the death
25 penalty?

1 A. You mean before the person was convicted?

2 Q. No, after they were convicted of capital
3 murder.

4 A. After they were convicted? Would you mind
5 repeating that, please?

6 Q. Okay. Let me just take you to the
7 hypothetical trial and your hypothetical jury.

8 A. Okay.

9 Q. Let's say you hear all the evidence in the
10 first part of the trial, because the way the trial works is
11 first is the guilt/innocence stage. And the only thing you
12 determine there is whether the person is guilty or not
13 guilty of capital murder the way the State has alleged it.
14 You would hear all the evidence, arguments, you would go
15 back in the jury room and you would deliberate. And you
16 would decide whether the person is guilty or not guilty,
17 only that, okay?

18 You are not going to decide punishment.
19 You are only deciding guilty or not guilty. If you find the
20 person not guilty, then the trial is over. Everybody goes
21 home, okay? If you find the person guilty, you come back
22 into the courtroom and the second part of the trial, which
23 is the punishment stage, would begin. Okay. So the way I'm
24 asking you is let's assume that you have gone back in the
25 jury room and you have found somebody guilty of capital

1 murder, or like in this case, guilty of killing a police
2 officer.

3 At that point when you come back into the
4 room, would your mind already be leaning towards the death
5 penalty because of your strong feelings or would it be
6 staying at life until the State can prove to you the Special
7 Issues beyond a reasonable doubt? How would you feel at
8 that point?

9 A. So does the State have to prove anyway?

10 Q. Yes.

11 A. Guilty or --

12 Q. Yes. First they have to prove to you beyond a
13 reasonable doubt that he's guilty of capital murder the way
14 they have alleged it. Can you hold them to that burden?

15 A. Yes, I would.

16 Q. Okay. Now, when you come back in on the
17 punishment stage, your mind can't be made up yet, okay? But
18 there's, you know, there's some people, because their
19 feelings are so strong about the death penalty, that in
20 their minds, once they come back to hear the punishment
21 stage, those Special Issues, especially Special Issue No. 1
22 and 2, in their mind is already answered in a way that would
23 result in the death penalty. Is that the way you might go?
24 Because if you do --

25 A. No.

1 Q. That's fine, we just need to know about it.

2 A. Uh-huh, I don't think so. I could keep an
3 open mind about that.

4 Q. Okay. When you say you could keep an open
5 mind, would you be -- would you state -- would your posture
6 be that it should be a life sentence, unless that could be
7 proven beyond a reasonable doubt on Special Issue No. 1 and
8 Special Issue No. 2?

9 A. Yes, uh-huh.

10 Q. Okay. And that's why I have to ask these
11 questions, because, you know, there are some people who, you
12 know, once they've proven capital murder, then, you know,
13 they're going to have, somebody is going to have to prove to
14 them why they shouldn't get the death penalty. And that's
15 not really the way the law is set out.

16 So, you can -- you're telling me, then,
17 that you would be in a posture where it would be a life
18 sentence, unless the State can prove Special Issue No. 1 and
19 Special Issue No. 2 to you beyond a reasonable doubt, and
20 then also take after that, considering the Special Issues --
21 I mean Special Issue No. 3, I'm sorry.

22 A. Well, if they could prove that beyond a
23 reasonable doubt that he did kill somebody, I would be in
24 favor of the death penalty.

25 Q. Okay. So, at that point you would already be

1 leaning toward the death penalty, once you found somebody
2 guilty of capital murder?

3 A. Yes, sir.

4 Q. Okay. And the Special Issue No. 1 and Special
5 Issue No. 2, that would have to be proved to you in the
6 negative in order for that person to really receive a life
7 sentence?

8 A. Yes.

9 Q. Okay. You understand, though, it's -- the law
10 would require you to have those issues, Special Issue No. 1
11 and Special Issue No. 2, to be answered no, unless the State
12 could prove them to you beyond a reasonable doubt. You
13 understand that, right?

14 A. Okay. Why am I -- why did I understand him and
15 I'm not understanding you?

16 Q. Maybe because I'm not understanding myself
17 sometimes.

18 A. No, I'm sorry, it's nothing against you. It's
19 just --

20 Q. No, no, that's all right. Let me just ask you
21 much simpler. What I'm hearing from you is that once you
22 have convicted somebody of capital murder, that in your mind
23 they should already receive the death penalty before we've
24 even got to the Special Issues. Am I correct in saying
25 that?

1 A. Right, yes, sir.

2 Q. Okay. Okay. But you understand that the way
3 the death penalty scheme is set up, that if you find
4 somebody guilty of capital murder, they are sitting on a
5 life sentence and they can't receive the death penalty.

6 A. Oh, I see what you're saying.

7 Q. See what I'm saying now?

8 A. Yes, sir.

9 Q. So, you know, tell me your true feelings. I
10 mean, you're the only one that can tell us what you really
11 think.

12 A. Well, I agree with the way the laws works.

13 Q. Okay. And that would be -- in your
14 understanding, what would that be?

15 A. That they need a life sentence until they're
16 proven that they need the death penalty.

17 Q. Okay. That's why I wanted to ask that,
18 because what I heard from you at first was, maybe it was the
19 way that I was asking it, was that you would already be
20 leaning toward somebody receiving the death penalty before
21 these Special Issues were even answered. But is that wrong?
22 I was wrong in saying it, I think.

23 A. I was contradicting myself. You heard me
24 right.

25 Q. Okay. All right. Well, let me ask you this.

1 You talked a little bit about what you have heard about this
2 case. You heard on the television, radio, or whatever media
3 you listened to, or watched. But you came down here in May
4 and you filled out the questionnaire and you went out and
5 educated yourself more about the case; is that correct?

6 A. From --

7 Q. You got on the Internet?

8 A. It was a one-page thing on the Internet

9 Q. Okay.

10 A. I'm sure there are lots of websites, but I
11 just clicked on one of them.

12 Q. Okay. Clicked on what, was it like the Texas
13 Seven Internet site? Is that what you had said?

14 A. I think I just typed in Texas Seven and
15 several things popped up and I just clicked on one.

16 Q. And was that like a news site, or what was it?

17 A. Sir, I have no idea. It was just a little
18 picture of him at the top. Well, first it was a list of
19 those involved. And I remembered the name and I clicked on
20 his name and it brought up a little picture of him and a
21 couple of paragraphs.

22 Q. And what -- what did you learn from that,
23 again, if you remember?

24 A. I remember that I think he had a beard in the
25 picture. Not a bad looking gentleman. And that he, I can't

1 remember what was mentioned, but he had some previous
2 trouble.

3 Q. Do you remember what that was?

4 A. No, sir, I don't.

5 Q. Okay. Was it -- in your mind was it some
6 serious trouble or -- or do you remember?

7 A. Well, it was some offenses. I don't know if
8 he'd been in jail before or not. I can't remember. But it
9 was --

10 Q. But did you learn if it was more than one
11 offense?

12 A. Yes, sir.

13 Q. You said some offenses?

14 A. Yes, sir.

15 Q. Many offenses?

16 A. I don't know how many.

17 Q. Okay. And, of course, now you have that
18 knowledge in your mind, correct? Based on what you learned,
19 I mean, what opinions have you formed about Mr. Murphy or
20 about this case?

21 A. I guess I was just curious. I think I had
22 heard that there were a couple who had given themselves up,
23 and I didn't know who was who and I just wanted to find out
24 if he was one of those or if he had been taken or I was just
25 curious.

1 Q. Okay. Well, and based on what you found out
2 as part of your curiosity, what opinions have you formed
3 about him before we even start trial?

4 A. I really didn't, I just didn't have any
5 opinions.

6 Q. Have you formed the opinion that he has been
7 in lots of trouble before?

8 A. I don't know about lots, but --

9 Q. But some?

10 A. That's what I read.

11 Q. Okay. And before you start the trial, of
12 course, you know, it's going to be hard to get that out of
13 your mind. You're going to know that going in and you're
14 going to be thinking that while you're listening to the
15 evidence.

16 A. Well, I think, I don't mean to make a blanket
17 statement, but I think a lot of people who are guilty of
18 things like that, probably have been involved in other
19 things in previous, you know, previous years, could have.
20 So that's not anything surprising or shocking to me.

21 Q. Of course, some of this is also based on what
22 you've learned, of course. And I'm not trying to say, you
23 know, you're doing something bad or anything. It's just,
24 you know, I need to know these things --

25 A. Yes.

1 Q. -- before we can put you on this jury.

2 A. Yes.

3 Q. And, you know, it sounds to me like you have
4 already formed at least some opinion about Mr. Murphy before
5 we've even started this case. Would I be fair in saying
6 that?

7 A. I guess you could say that.

8 Q. And, of course, you would, you know, it's kind
9 of hard to unring the bell, once you've heard something. I
10 mean, that would, you'd know that once you were sitting over
11 there in the trial and it could affect you in some way. We
12 don't know now how it could, but it could. Would that be
13 fair to say?

14 A. Yes, sir.

15 Q. Okay. And there's nothing wrong with that. I
16 mean, that's why we ask these questions. Okay?

17 A. Yes, sir.

18 Q. Now, let me ask you a little bit, also, about
19 some things that the State had talked to you about, whether
20 you could hold the -- as you know, you've read in the -- I
21 don't know if you got to look at the indictment in this case
22 before you walked in here today. Did you get it as part of
23 your reading material?

24 A. Yes. Yes.

25 Q. And every indictment has to be proven by the

1 State, like they told you. Every element in there has to be
2 proven to you. They've given you the example of not proving
3 the right county, which is one of the elements that they
4 would have to prove. And if they couldn't, then you would
5 have to find Mr. Murphy not guilty. And you said you could
6 do that.

7 But they also, not only do they have to
8 prove capital murder, they have to tell you, they have to
9 prove to you how they say it happened. They have to prove
10 the manner and means of the capital murder. One example
11 sometimes that's given is the indictment says that the
12 officer was murdered by being shot, being shot with a gun.
13 And if you're sitting in trial and the evidence shows you
14 that he didn't die that way, that wasn't the manner and
15 means of his death, that he died from a stabbing with a
16 knife, that would be different than what they put in their
17 indictment and the law would require you to find him not
18 guilty, because there's a variance in what they have alleged
19 and what was proved, okay?

20 You know, frankly, some jurors say, well,
21 you know what, you proved the murder to me either way. I'm
22 not going to find somebody not guilty. I'm not going to let
23 somebody walk just because of that little mistake. What do
24 you think about that?

25 A. Well, if that's the law, I mean, that's the

1 way it has to be.

2 Q. Would you find him not guilty?

3 A. Yes, if there was a discrepancy in the
4 variancy that you talked about.

5 Q. Okay. And you wouldn't have a problem with
6 that?

7 A. No, sir.

8 Q. Okay. All right. This issue, I hate to keep
9 going back to the issues, but, of course, you know, that's a
10 large part of what we have to talk about. And I think they
11 covered a little bit, but I want to ask you again. These
12 decisions you make, you know, the verdicts that you make in
13 this case, the verdict of whether someone is guilty or not
14 guilty in the first part of the trial, and these Special
15 Issues, they're all supposed to be answered independently of
16 one another.

17 What I mean by that is whatever you
18 answer in one question shouldn't affect what you answer in
19 the next question. You might be looking at all the same
20 evidence, but it shouldn't dictate what your answer should
21 be in the next one, okay? And Special Issue No. 1, we've
22 had jurors that say, well, once I find somebody guilty of
23 capital murder, then I'm automatically always going to
24 believe that he's a continuing threat to society, just based
25 on the fact that I've already convicted him of capital

1 murder. See what I'm trying to say?

2 A. Yes, sir.

3 Q. What do you think about that? What do you
4 think about people who do that? Are you in that category?

5 A. I don't believe I am.

6 Q. Okay. So the fact that you found somebody
7 guilty of capital murder, that wouldn't automatically answer
8 Special Issue No. 1 for you, yes, that he's a continuing
9 threat to society?

10 A. I would believe he would be a continuing
11 threat.

12 Q. Okay. And would that be based solely on the
13 fact that you convicted him of capital murder or based on
14 other things that you have learned before the trial, or --

15 A. I believe it would be based on the conviction
16 of capital murder.

17 Q. Now, just to nail down your answer, the law
18 would tell you that you can't do that. But you're telling
19 us right now that that's -- that would be your thinking?

20 A. Okay. So what's the law's position, once
21 again?

22 Q. Now, the law says that Special Issue No. 1
23 should not be answered yes, just because you found somebody
24 guilty of capital murder, that there should be an
25 independent inquiry, or you're supposed to look at that

1 question independently. Like I said, you may be looking at
2 the same evidence.

3 But some people say, once I convict
4 somebody of capital murder, then Special Issue No. 1, the
5 question of whether he's a continuing threat to society, in
6 my mind would already automatically be answered yes, just
7 because I found him guilty of capital murder. And you told
8 us that you would already think he was a continuing threat
9 to society, just because you found him guilty of capital
10 murder.

11 MR. WIRSKYE: Excuse me, Your Honor. I'm
12 going to object. She asked what the law was, and I don't
13 believe Mr. Sanchez actually fully explained the law to her.
14 I object on those grounds.

15 THE COURT: Sustained. Ms. Cunningham,
16 let me try to come down the middle between all the lawyers,
17 okay? Tell me in your mind what you believe the law to be
18 regarding Special Issue No. 1? Here's my question. Who has
19 to prove it to you?

20 PROSPECTIVE JUROR: The State.

21 THE COURT: If you have found someone
22 guilty of capital murder, and I believe in the guide there
23 were eight different ways to be found guilty of capital
24 murder, if you recall, killing a police officer, fireman,
25 child under six, during the course of a robbery, rape, other

1 felony. You understand that scheme?

2 PROSPECTIVE JUROR: Yes, sir.

3 THE COURT: It's two separate trials, if
4 you will. Jury could find the person guilty or not guilty
5 in the first trial. If they have found someone guilty of
6 capital murder, here's the question for you. What are the
7 two possible punishments, if someone is guilty of capital
8 murder?

9 PROSPECTIVE JUROR: Life imprisonment or
10 the death penalty.

11 THE COURT: Okay. Going to the second
12 phase of the trial, that's the decision before the jury.

13 PROSPECTIVE JUROR: Yes, sir.

14 THE COURT: First question the jury must
15 answer is called Special Issue No. 1. You have already told
16 me you understand the State has to prove it to you.
17 Question, are you going to be able to answer that issue both
18 yes and no after -- this is hypothetical. If you were a
19 juror and you had found someone guilty of capital murder of
20 one of the eight different ways, are you going to be able to
21 listen to the second phase of the trial?

22 They may present more evidence. They may
23 not. They may say, jury, please go reconsider everything
24 you've already heard. Or the State may present more
25 evidence to you in trying to assist the jury in answering

1 that question.

2 Mr. Sanchez wants to know, are you going
3 to be able to back up and make an independent investigation
4 of everything that you've heard and answer that question yes
5 or no?

6 PROSPECTIVE JUROR: Yes, sir.

7 THE COURT: You already said, I'm
8 predisposing, I'm a little tending toward the death penalty.
9 But if you answer that question no, what would be the
10 sentence?

11 PROSPECTIVE JUROR: I could certainly go
12 with life imprisonment, if we looked at the facts again.

13 THE COURT: So you would be able to
14 answer that question independently of anything else we're
15 doing? Yes or no?

16 PROSPECTIVE JUROR: Yes, sir.

17 THE COURT: Thank you very much.

18 Mr. Sanchez?

19 Q. (By Mr. Sanchez) Okay, Ms. Cunningham.

20 A. I'm sorry I took so long trying to weed all
21 that out.

22 Q. That's okay. It's okay. Sometimes I don't
23 explain things well. It's right after lunch, too, you know.
24 Let me ask you this. Special Issue No. 2, as you can see
25 there, you're going to have to decide, or you and the jury

1 are going to have to decide, whether if someone is convicted
2 as an accomplice, like the State had talked to you about,
3 whether that person actually anticipated that a human life
4 would be taken. You remember talking about that?

5 A. Yes, sir.

6 Q. And, as you can see, you are going to have to
7 decide what the defendant, or the person who is on trial, is
8 actually thinking. Would you agree with me on that?

9 A. Yes, sir.

10 Q. Some jurors have told us, well, you know, it's
11 hard for me to decide that question or I can't get in
12 somebody's mind to figure out what they were actually
13 anticipating, unless I hear from that person. What do you
14 think about that?

15 A. I can understand why they would say that.

16 Q. Okay. What are your feelings about that?

17 A. I feel the same way. The fact, if they were
18 involved in it, comes -- actions speak pretty loud.

19 Q. Okay. Okay. Well, you know the Fifth
20 Amendment right not to testify or to testify, not only is it
21 -- does it run through the guilt/innocence stage of the
22 trial, it also applies to the punishment stage of the trial,
23 okay? So, in other words, nobody can force Mr. Murphy up on
24 the stand and explain to you or tell you whether he
25 anticipated or didn't anticipate or what he thought at that

1 moment.

2 There's some jurors that say, well, you
3 know what, in order for me to answer that question no, I
4 would have to hear from him, because, otherwise, I've
5 already answered it yes in my mind. What do you think about
6 that?

7 A. He doesn't have to do anything, unless he
8 wants to.

9 Q. Exactly. But there's some jurors that say,
10 unless I hear from him, then somehow I'm going to take that
11 as a sign or evidence that maybe he did anticipate. You
12 wouldn't do that?

13 A. No. To me that would have no bearing on --

14 Q. It wouldn't have any bearing on it?

15 A. No, sir.

16 Q. Okay. All right. And as Mr. Wirsky
17 explained to you about should have and actually anticipated,
18 you saw the distinction in those two standards, right?

19 A. What were the two standards?

20 Q. To find somebody guilty as a party of capital
21 murder in the first part of the trial, all the State has to
22 prove to you is that that person should have anticipated
23 that a human life would be taken, okay? But in order for
24 them to get you to answer Special Issue No. 2, they have to
25 prove to you beyond a reasonable doubt that the person

1 actually anticipated that a human life would be taken. Do
2 you see the distinction there?

3 A. Yes, sir.

4 Q. Okay. There are some people that tell us,
5 well, once I found that he should have anticipated that a
6 human life would be taken, then in my mind that's almost the
7 same thing as that he actually anticipated that a human life
8 would be taken. In other words, I wouldn't make the State
9 prove to me that higher burden. It would already be
10 answered in my mind, once I convicted him of capital murder.

11 A. I think they would have to prove that.

12 Q. Okay. So you would make the State do that?

13 A. I believe so.

14 Q. Okay. When you say you believe so, I mean, I
15 hate to pin you down, but, I mean, would you?

16 A. Yes.

17 Q. Okay. Okay. And, again, on Special Issue No.
18 3, you know, it's the last step. That's the last question
19 you have to answer and you would only get there, if you
20 answered Special Issue No. 1 and Special Issue No. 2 yes,
21 the last step before the death penalty could be imposed.
22 You appreciate that, right?

23 A. Yes, sir.

24 Q. Okay. There's some people that say, you know,
25 my feelings about the death penalty are so strong, that once

1 I've convicted somebody of capital murder, once I found that
2 they're a continuing threat to society, and once I've
3 decided that they actually did anticipate that a human life
4 would be taken, Special Issue No. 3, you know, wouldn't have
5 much value in my mind.

6 I mean, once I'm that far in the thought
7 process, I mean, there's not going to be anything that I can
8 hear that would keep me from giving somebody the death
9 penalty or answering that their life should not be spared.
10 What do you think about that?

11 A. I believe that life imprisonment needs to be
12 taken into consideration.

13 Q. Okay. Are you the type of juror -- can you
14 tell us today, if you are the type of juror that can take
15 pen in hand and look at all the evidence and even after
16 you've convicted somebody of capital murder and answered
17 Special Issue No. 1 and Special Issue No. 2 yes, that you
18 could actually sit there and write an answer in Special
19 Issue No. 3 that would result in a life sentence?

20 A. Yes, sir.

21 Q. Okay. And you wouldn't have to worry about
22 explaining yourself to anybody or worry about any outside
23 pressure or social climbing or anything like that?

24 A. No, sir.

25 Q. Thank you for answering all my questions.

1 A. You're welcome.

2 MR. SANCHEZ: That's all I have right
3 now, your Honor.

4 THE COURT: Thank you, Ms. Cunningham.
5 If you would be so kind to wait for us out in the hall.
6 We'll have you back in just a few minutes.

7 PROSPECTIVE JUROR: Okay. Thank you,
8 sir.

9 [Prospective juror out]

10 THE COURT: Mr. Wirskye, what says the
11 State?

12 MR. SHOOK: State has no challenge for
13 cause.

14 THE COURT: Mr. Sanchez?

15 MS. BUSBEE: Your Honor, over at this
16 table we think that this juror has obviously and quite
17 clearly stated bias in favor of the death penalty over a
18 life sentence in a capital case. Anytime the juror has
19 stated bias concerning the law that we're entitled to rely
20 on, I think that they're subject to challenge for cause.

21 THE COURT: Obviously, I listened very
22 carefully, but when the respective juror herself said, well,
23 Mr. Sanchez, you're confusing me, and Mr. Sanchez says,
24 well, I can't ask a decent question and get her all confused
25 and then I ask a very openended, tell me what the law is and

1 she gets it right, I do not find that she has a bias, once
2 she understands the law.

3 MS. BUSBEE: Okay. Well, I'm -- because
4 I'm talking about the totality of the voir dire. But I have
5 another one. She has told -- she told us in a response to
6 Mr. Wirskye's question that as far as she was concerned, if
7 the major actor, that is, for example, in their
8 hypothetical, the triggerman, had formed an intent that she
9 would consider the parties to have the same intent based on
10 the actions of the triggerman.

11 That's -- what she is saying is, is that
12 it won't matter what evidence that has, what evidence
13 reflects upon the defendant's intent, she will consider him
14 to have had the intent of the primary actor.

15 THE COURT: Mr. Wirskye?

16 MR. WIRSKYE: Judge, I think the law is
17 real clear on this. The juror's personal predisposition one
18 way or another to life or death is irrelevant. It's whether
19 they can follow the law and hold the State to the burden of
20 proof. And when they look at the Special Issues, this juror
21 said she could do that repeatedly. Whether she has a
22 personal predisposition towards life or death is really
23 irrelevant. She's a qualified juror, because she would
24 follow the law and hold to us our burden.

25 THE COURT: The totality of her

1 examination reveals to the Court that she was, one, she was
2 wanting to understand what the program was. She was
3 thoughtful in her answers. When asked or given a statement
4 that had two questions and an opinion on the back end of it,
5 what do you think, I mean, I'd have a hard time answering
6 some of these questions that were asked.

7 I believe the Court's opinion she has a
8 reasonable understanding of the law, has instructed the
9 Court that she can follow the law, and I find this juror to
10 be qualified.

11 MS. BUSBEE: And I have yet another one.
12 And may I apprise the Court, as always these challenges for
13 cause are offered pursuant to Article 1, Section 10 of the
14 Texas Constitution, Article 6 and 14 of the United States
15 Constitution.

16 And I apprise the Court that these three
17 challenges for cause are subject or pursuant to those
18 provisions she, subsequent to filling out this
19 questionnaire, after she was under oath and instructed by
20 the Court not to make inquiries about this case, she has
21 admitted to this Court that she has made inquiries by doing
22 an Internet search and she has read about the defendant's
23 record.

24 And she said to the Court, and I'm
25 paraphrasing here, frankly, I feel that there's more, always

1 more there, and that she has formed an opinion as to the
2 defendant's criminal record, and that she didn't say that
3 she would set that aside. She just said that was her
4 opinion.

5 And I think that she has -- she's
6 violated the rules that the Court set forth at the voir dire
7 proceeding which we had in May. And, therefore, she has
8 formed an opinion as to the facts of this case and as to the
9 defendant's prior criminal history, which, of course, is not
10 admissible under most circumstances in the first part of
11 this trial, guilt and innocence.

12 THE COURT: Well -- my previous trials
13 which the jury will know at some point that there was a
14 prison escape. So that in and of itself doesn't take a
15 rocket scientist to go over that hurdle. That there was
16 some history, she has indicated.

17 Now, specifically, Ms. Busbee, I have
18 stayed away from instructing the jury, if I recall, in my
19 special voir dire in May, I certainly didn't instruct them
20 to not investigate. I didn't say anything at all, if I
21 recall. Just like today, I didn't say anything about media.
22 I didn't say anything about the case. Let the questionnaire
23 speak for itself. Because it's one of those things I don't
24 want to call attention to the situation to where someone
25 might go out. Oh, the Judge says don't do this; therefore,

1 I'm going to go look and see why I'm not supposed to do it.

2 I believe that she was quite honest in
3 her proffer that, hey, after the questionnaire, I did go
4 look on the Internet and find out his name and recognized
5 his picture with the beard. But, you know, I can set that
6 aside. If she is on the jury, obviously, I will instruct
7 her, as I have done in the past in writing and today, that
8 she's not to look at anything further, from any source or
9 don't discuss this case with anyone. I believe she
10 understands that.

11 She said that she could make a decision
12 based on the evidence she hears in open court. She is --
13 once again, once she understood the law she, said, yes, I
14 could set that aside and base my decision on the evidence I
15 heard in court. Am I wrong in my remembering of what we did
16 in May?

17 MS. BUSBEE: I thought you said that,
18 Your Honor, but I -- the record will show. I'm sure you
19 know better than I do, but it seemed to me that they were
20 told that. But, it'll be what it was.

21 THE COURT: Mr. Shook, can you discern
22 the difference between this morning and what we did in May?

23 MR. SHOOK: No, sir. Of course, May was
24 a long time ago.

25 THE COURT: I understand. We've only had

1 two trials since then. I mean, let me tell you this. I can
2 have Nancy look and that's a fairly short portion of the
3 voir dire, my remarks --

4 MR. SHOOK: Judge, regardless of that, I
5 think what the woman said was, she read something, but
6 didn't remember. I mean, every juror --

7 THE COURT: I'm not worried about that.
8 My comment is, if I instructed the panel that she was on not
9 to make any investigation, not to inquire over the Internet
10 and she did so, I would, you know, be short of holding her
11 in contempt, that would be where I would end up on the deal.

12 MS. BUSBEE: What about this. What if,
13 hypothetically, if we used a strike and then you later find
14 out that that was said, you could give us an additional
15 strike?

16 THE COURT: That would be a wonderful
17 reason to give you an additional strike.

18 MS. BUSBEE: Right. So that way we
19 wouldn't have to stop.

20 THE COURT: Sounds good to me. You've
21 got your built-in strike. The Court, having found Ms.
22 Cunningham qualified, what says the State?

23 MR. WIRSKYE: State will accept the
24 juror.

25 MR. SANCHEZ: We will exercise a strike,

1 Your Honor.

2 THE COURT: Strike No. 11. Please ask
3 her to come back in.

4 [Prospective juror in]

5 THE COURT: Ms. Cunningham, I want to
6 thank you for your very thoughtful time and attention to
7 this Court, very careful deliberation on these issues. I
8 will instruct you that you are not going to be seated on
9 this jury. So thank you for your time and you are free to
10 go.

11 PROSPECTIVE JUROR: Thank you, sir. It's
12 been an education today.

13 THE COURT: Probably more than you
14 wanted.

15 PROSPECTIVE JUROR: Good luck to all of
16 you.

17 [Prospective juror out]

18 THE COURT: Ms. Martin.

19 [Prospective juror in]

20 THE COURT: Good afternoon.

21 PROSPECTIVE JUROR: Good afternoon.

22 THE COURT: We have juror No. 4245,
23 Bonnie Jean Martin. Good afternoon, Ms. Martin, how are
24 you?

25 PROSPECTIVE JUROR: Just fine.

1 THE COURT: Sorry for the delay in
2 getting you in. Have you had an opportunity to read the
3 guide I provided for you?

4 PROSPECTIVE JUROR: Yes.

5 THE COURT: And also a copy of your
6 questionnaire that you filled out for us back in May?

7 PROSPECTIVE JUROR: Yes.

8 THE COURT: I know that's a lot of law to
9 give someone. We don't expect you to understand it all
10 right now. The objective here is for the attorneys to visit
11 with you and discuss the law and the issues and for you to
12 understand how it all relates. There are no wrong answers,
13 just truthful and honest answers. And really this is the
14 only way we can do it. And some people come in and they're
15 kind of nervous or uneasy. This is as informal a process as
16 we can have.

17 If you would, just think about these
18 issues and visit with the lawyers. At the end of the day I
19 have two questions I must ask. One is, do you understand
20 the law? No. 2, can you follow the law? That's the big
21 picture I have to make the decision on. The only question I
22 have for you is will you be able to serve this Court for a
23 period of two weeks beginning on November 10th?

24 PROSPECTIVE JUROR: Yes.

25 THE COURT: Thank you very much. If you

1 would, please give your attention to Mr. Shook.

2 MR. SHOOK: May it please the Court?

3 BONNIE MARTIN,

4 having been duly sworn, was examined and testified as
5 follows:

6 DIRECT EXAMINATION

7 BY MR. SHOOK:

8 Q. Ms. Martin, my name is Toby Shook. I'm going
9 to be asking questions on behalf of the State this
10 afternoon. And, as the Judge said, there aren't any right
11 or wrong answers, just honest ones is all we're looking for.
12 I'm going to finish -- I'm going to go over a few things on
13 your questionnaire and then talk about capital murder, the
14 law that applies to this case and see how you feel about
15 that. But if you have any questions at any time, feel free
16 to ask, okay?

17 A. Yes.

18 Q. I see by your questionnaire you now work in
19 market as a market research analyst?

20 A. Yes.

21 Q. If you would, just tell us a little more what
22 you do on a day-to-day basis.

23 A. On a day-to-day basis I do corporate
24 intelligence and market analysis for a very small niche
25 industry, which is Postal Automation.

1 Q. Okay. And I saw in the -- somewhere in the
2 past that you worked as a paralegal for some time. How long
3 ago was that?

4 A. That was about ten years ago.

5 Q. Okay. Now, you didn't do any criminal law; is
6 that right?

7 A. No. I worked for a plaintiff's attorney, solo
8 practitioner.

9 Q. How long did you work with him?

10 A. Three years.

11 Q. All right. Is that when you decided to go
12 into this market research analysis after that?

13 A. I had an opportunity to join this company and
14 work on contracts. And then the division that I went into
15 was closed, and so I applied for and got the next job.

16 Q. I also see from your questionnaire that you
17 have sat on one jury back in 1990; is that right?

18 A. Yes.

19 Q. It was some type of burglary case?

20 A. Yes.

21 Q. If you would, tell us what you remember about
22 the facts, if you do remember much. I know it's been a
23 while.

24 A. The defendant burglarized or robbed a
25 business. And at the punishment phase of the trial they

1 said that there had been a gun involved.

2 Q. Okay. So there was some evidence of a weapon
3 involved?

4 A. Yes, there was a weapon involved.

5 Q. Do you recall if the defendant actually
6 testified in that trial?

7 A. No, the defendant did not.

8 Q. Okay. Was there a previous criminal record
9 shown at all?

10 A. Not until later.

11 Q. Okay. Did the jury sentence the defendant?

12 A. Yes.

13 Q. What was the sentence, if you recall?

14 A. That, I don't recall.

15 Q. A term of years in prison or probation, or --

16 A. Years in prison, but I don't remember the
17 time.

18 Q. All right. How did that service go? Was it,
19 over all, a pleasant experience? Were there a lot of
20 arguments back in the jury room or was it pretty cut and
21 dried in your mind, or what do you recall about that?

22 A. Well, it's always, I think, something that
23 makes you a little nervous to have that kind of
24 responsibility, and it took some time back in the jury room
25 to come to a decision.

1 Q. Was that in the punishment phase or the
2 guilt/innocence stage?

3 A. In the guilt/innocence phase.

4 Q. From your own point of view, did you have
5 trouble coming to a decision or was it just trying to get
6 others to come to a decision, convince others?

7 A. It was more getting the entire group to come
8 together.

9 Q. All right. Did you participate a lot in the
10 discussion itself?

11 A. Yeah, probably.

12 Q. Would you feel the experience was positive or
13 negative, or could you say?

14 A. It's both. You know, you learn, you learn
15 from it.

16 Q. All right. Let's talk to you for a little bit
17 about how you feel about capital murder and the death
18 penalty. Are you in favor of the death penalty as a law or
19 as a punishment in our society?

20 A. Yes.

21 Q. Okay. In your own words, tell us why you
22 favor the law or why you feel we need a death penalty or
23 what purpose it serves.

24 A. Well, I favor it because at this point, living
25 in Texas, it is the law in Texas and that is how they settle

1 things. It also, hopefully, serves as a deterrent or at
2 least some type of deterrent for other crimes. And I think
3 that there are crimes that are committed that are so heinous
4 that there has to be a large punishment.

5 Q. Okay. What types of crimes would those be in
6 your mind, when you think of a crime that's just so bad that
7 the death penalty would be the correct punishment?

8 A. Crimes against -- horrible crimes against
9 children, horrible crimes against anyone, taking a life.

10 Q. Okay. You said you favor the law right now
11 because you know that that's how the law works right now in
12 Texas. A lot of times we like to ask a question this way.
13 We want to make you Governor of Texas for a day, let's say.
14 And we give you a lot of power and you get to decide which
15 laws are on the books and which laws aren't. You don't have
16 to consult the Legislature or anything. It's all up to you.
17 We could even make you queen of Texas for a day, let's say.
18 Sometimes we put it that way. But if you could decide and
19 it were up to you personally, would you have a death penalty
20 statute?

21 A. I'd have to think long and hard before I would
22 remove it, yes.

23 Q. Okay. Have you ever followed any cases in the
24 news, locally or nationally, that you thought was a death
25 penalty case, or one that at least should be considered as

1 an option?

2 A. Well, I do a tremendous amount of reading, so,
3 and follow a lot of things with my work. So, yes, I mean, I
4 see them. I know of them.

5 Q. Do you recall any that you could describe to
6 us that we might recognize or any of the defendants' names
7 or anything like that?

8 A. No.

9 Q. Okay. While we're on that subject, let me ask
10 you this. Almost every juror that filled out the
11 questionnaire was asked about the publicity in this
12 particular crime, and almost all had seen or read something
13 about it. And so we ask each juror what they recall hearing
14 about the case. I know it was a while back, but as best you
15 can remember, what details do you recall about the case?

16 A. Well, I remember that it was a group of people
17 who had broken out of prison. And I think they had spent
18 some amount of time other places before they came to the
19 Dallas area. That crime was committed and then they left
20 the State and were somewhere else. But timelines or
21 anything like that, I don't recall. And I have access, I
22 could probably pull all of those things up again, but I
23 chose not to.

24 Q. Okay. The law is this. Just because you've
25 seen something on TV or read something in the newspaper or

1 on the Internet, doesn't mean you are ineligible as a juror.
2 But to be qualified as a juror, you have to be able to
3 assure the Court that you could, if chosen, listen to the
4 evidence in the courtroom, listen to the witnesses, and make
5 your decisions based on that testimony and not anything that
6 you have read outside the courtroom.

7 We can't ask you to forget about what
8 you've seen or read, but we can ask you to tell us honestly
9 whether that would influence you or not, because, obviously,
10 we have to have jurors who could make their decisions on the
11 actual testimony and not let anything they've read outside
12 the courtroom influence them in any way.

13 And it will just depend on your own
14 honesty and knowing how you feel about it for that
15 particular part of this. As best you know yourself, would
16 you be able to follow that rule of law?

17 A. Yes.

18 Q. Okay. On page 4 of the questionnaire, and,
19 you know, we asked a whole lot of questions. But at the top
20 -- in fact, I think it's the third question down, we asked
21 one question that if you do believe in using the death
22 penalty, how strongly? And we say on a scale of 1 to 10,
23 how do you hold that belief, 10 being the most. And you
24 left that one blank. And I didn't know if that was an
25 oversight or you just couldn't decide, because that

1 particular question, people answer it for different reasons.

2 A. Okay. I think that was just an oversight.

3 Q. Okay. Kind of as a gut reaction, now that you
4 have seen the question, how do you think you would answer
5 that?

6 A. I would hold to at least an 8 or a 9.

7 Q. Okay. You know from reading the material the
8 Judge has given you, that the death penalty in Texas is
9 reserved just for certain types of murder cases. It's not
10 self-defense situations or accidents. It's an intentional
11 killing and murder cases with some other aggravating fact.
12 We have lots of murder cases, brutal murder cases, that
13 don't fall under the death penalty statute.

14 To get to the death penalty statute, you
15 have to have an intentional murder, plus another aggravating
16 fact, such as a murder that occurs during the course of a
17 felony, for instance, robbery. If I go into a 7-Eleven
18 store and pull a gun out and shoot the clerk during a
19 robbery, that could be a death penalty case, murder during a
20 burglary. If I break into someone's home, burglary during a
21 rape, or kidnapping, or arson.

22 Also, murder of specific individuals,
23 such as a police officer on duty, fireman on duty, that
24 could be a death penalty case, child under the age of six.
25 Murder for hire, if you kill someone for money or personal

1 gain. Murder of more than one person, such as a serial
2 killer situation or mass murder.

3 Those are the specific situations that
4 have been reserved for consideration of the death penalty.
5 As far as those types of crimes go, do you feel those are
6 the types of crimes from your own personal point of view
7 that you feel should come under consideration for the death
8 penalty?

9 A. Yes.

10 Q. Okay. Now, when we think of capital murder,
11 we normally always envision a fact situation and usually
12 that of the actual triggerman or the person that causes the
13 death. That's only natural. But capital murder, like other
14 crimes, can be carried out by more than one individual.
15 There could be accomplices involved as a contract. We call
16 that the law of parties in Texas.

17 But if several people are involved in the
18 crime, they can all be held accountable, if they are
19 actively involved or aiding, directing, and encouraging each
20 other in committing that crime. The same is true of capital
21 murder.

22 An example we often use is if Mr. Wirskey
23 and I decide we want to rob our neighborhood bank. Our plan
24 calls for me to go to the bank and I'm going to have a gun.
25 And I'm going to go in there, draw the gun out, threaten the

1 tellers, get their hands in the air. And after I do that,
2 he will go in with me and he will put the money from their
3 cash drawers into a bag and round up all the money.

4 Now, during the course of that robbery,
5 if I shoot one of the tellers intentionally, maybe I don't
6 like the way they're looking at me, maybe he tells me one is
7 going for a silent alarm, I would kill them intentionally.
8 We would flee and be caught. Obviously, I could be
9 prosecuted for capital murder and I could receive the death
10 penalty from a jury. The law says that he could also be
11 prosecuted, if the jury believes he's actively involved and
12 could ultimately receive the death penalty.

13 But people feel very differently about
14 that area of the law. And, as the Judge has said, there are
15 no right or wrong answers. Some people believe in the death
16 penalty, but if it were up to them, they would reserve it
17 for those fact situations just involving the actual
18 triggerman, the man that causes the death. If it were an
19 accomplice situation, someone who didn't actually cause the
20 murder, they would reserve some other type of punishment,
21 some long prison term, some kind of bank robbery conviction,
22 and that sort of thing. They don't think it's fair that the
23 death penalty be administered to accomplices.

24 Other jurors tell us they do think it's
25 fair that the death penalty could be prosecuted in an

1 accomplice situation and an accomplice could receive the
2 death penalty, depending on their involvement. And that's,
3 people come down on different sides of that particular
4 issue, and we just wanted to ask you, honestly, how you feel
5 about the prosecution of an accomplice in a death penalty
6 situation?

7 A. It's a hard question, but I feel that when
8 people enter into a situation where they know that they are
9 going to commit a crime and either one of them could be
10 responsible for shooting something, that they're both --
11 they both have put that in their mind that that is what
12 could happen, and either one of them could be the person
13 that would carry that out.

14 Q. Okay. So you feel that as far as the law
15 goes, an accomplice could be prosecuted for the death
16 penalty and ultimately could receive it?

17 A. Yes. It would depend on what you hear during
18 the trial, also, I think.

19 Q. What types of factors are important to you in
20 that situation?

21 A. Well, I suppose if you had one person that
22 didn't even approach the scene and was, stayed blocks away
23 as a lookout or something, maybe that would change my mind.
24 But if those that are at the scene probably have discussed
25 their actions or what they would do.

1 Q. Okay. Now, let me ask you this. You told us,
2 quite honestly, back in that burglary case that that did
3 bother you somewhat, making that type of decision involving,
4 affecting someone's future, I guess. It's only natural, I
5 think you said. This situation involves the actual
6 execution of another human being. You probably know, you
7 read the news a lot, that executions in Texas actually do
8 take place.

9 Some states have the death penalty on the
10 statute, yet they never carry it out. But, you know, coming
11 from Texas, it is a punishment that is sought and also
12 carried out, that Texas, in fact, leads the nation in
13 executions. So we're talking about a very real punishment.

14 And people feel differently about
15 actually sitting on these types of cases. We have people
16 that believe in the death penalty sometimes, but when it
17 comes down to making that decision, they are too
18 uncomfortable with it, because it does involve the taking of
19 another human's life and they, quite frankly, tell us they
20 don't want that type of responsibility and wouldn't be
21 comfortable making that situation. And their -- those
22 feelings would interfere with their decision-making process.

23 Other people can. And that's why we call
24 so many people down here, because some people do have
25 problems with it. I can tell you -- are you familiar with

1 the method of execution in Texas?

2 A. Yes.

3 Q. Lethal injection?

4 A. Yes.

5 Q. That, quite frankly, is our goal in this case.

6 We feel we have the type and quality of evidence to convince
7 a jury of the defendant's guilt and that the questions would
8 be answered in such a way that some day he will be executed
9 by lethal injection. And, again, you know from living here,
10 that that's a very real punishment. You can fully expect
11 that to happen, if those were the findings in this case.

12 How do you personally feel about sitting
13 as a juror? Do you think this is something, a decision you
14 could make, if it's proven to you or would you have some
15 reservations about making that decision, an actual
16 life-and-death decision?

17 A. I think that I could make that decision. It
18 is an uncomfortable situation for anyone, I think, to say
19 that it would be an easy decision or an easy thing to deal
20 with. But I think that I could make the decision based on
21 what was presented.

22 Q. Okay. If you'll take a moment to read Special
23 Issue No. 1 to yourself.

24 MR. SHOOK: Judge, actually I think
25 that's all the questions I have at this time.

1 MS. BUSBEE: Your Honor, if it please the
2 Court, we've reached an agreement in this matter on this
3 juror.

4 THE COURT: Ms. Martin, I want to thank
5 you for your time and service today. The parties have
6 agreed that you are not going to be seated on this jury. So
7 you can be excused. Thank you so much.

8 PROSPECTIVE JUROR: Thank you.

9 [Prospective juror out]

10 THE COURT: Ms. Anderson.

11 [Prospective juror in]

12 THE COURT: Good afternoon.

13 PROSPECTIVE JUROR: Good afternoon.

14 THE COURT: Please have a seat and make
15 yourself comfortable as best you can.

16 PROSPECTIVE JUROR: Okay.

17 THE COURT: Juror No. 2691, Ms. Jan Marie
18 Anderson; is that correct?

19 PROSPECTIVE JUROR: Yes.

20 THE COURT: Welcome to the 283rd. Sorry
21 for the delay in getting you in. We never know exactly how
22 long we are going to speak with someone. The first lady was
23 almost an hour and a half, the second lady was just a few
24 minutes. So I have to balance 15 people wait or one or two.
25 So as my letter told you, you were signed up for half a day

1 anyway, so if we get you out by 5:00 we've done our job.

2 PROSPECTIVE JUROR: Okay.

3 THE COURT: So I apologize for getting
4 you in, but it's one of those things. I just have to take
5 it as it comes.

6 PROSPECTIVE JUROR: Okay.

7 THE COURT: I take it you -- have you --
8 obviously, you've had enough time to read that guide,
9 probably two or three times, enough to be confused, haven't
10 you? Right?

11 PROSPECTIVE JUROR: Yes.

12 THE COURT: Okay. We've also provided a
13 copy of your questionnaire to help you refresh your memory
14 on the answers that you provided. And, also, if the
15 attorneys would like to ask you to further elaborate on an
16 answer or to look at and explain the answer, sometimes it
17 helps to have that in front of you.

18 PROSPECTIVE JUROR: Okay.

19 THE COURT: Bottom line is there are no
20 wrong answers, just truthful. And I know people come in and
21 they get kind of nervous and you walk in and everybody is
22 looking at you and, you know, downstairs you can hide. You
23 were one of 700 people. Up here you can't. So you get the
24 best seat in the house.

25 If you would, at the end of the process,

1 I have two questions I must ask you. Number one is, do you
2 understand the law? Number two, can you follow the law?
3 That's the big picture here. Those are the questions that I
4 have to answer at the end of this process. Only question I
5 have for you at this time is will you be able to serve this
6 Court for a period of two weeks beginning on November 10th?

7 PROSPECTIVE JUROR: Well, we have tickets
8 to California that my inlaws have already bought and we
9 leave the 21st.

10 THE COURT: Of?

11 PROSPECTIVE JUROR: Of November.

12 THE COURT: That's Thanksgiving.

13 PROSPECTIVE JUROR: Friday, November
14 21st, is when we leave.

15 THE COURT: So you're leaving
16 Thanksgiving week?

17 PROSPECTIVE JUROR: For that week, yeah.

18 THE COURT: I do not anticipate that
19 Friday being an issue. That would be the second Friday of
20 the week of trial. Yes, that would be the second Friday. I
21 do not anticipate that will be in play, but it could be.

22 Let me give you a hypothetical. Say the
23 jury were still out making decisions on that Friday, you
24 would have to either, A, delay your flight, or catch up on
25 Saturday your, or whatever. I know that they've already

1 prepaid. I can tell you that airlines have obeyed a court
2 order before and allowed a party to change their flight to a
3 later date and time.

4 PROSPECTIVE JUROR: Well, on a personal
5 level, it's my inlaws' 40th wedding anniversary which
6 they're celebrating Saturday, the 22nd. And that's why
7 we're going that week. So it would be a shame, I mean, I'd
8 hate to miss it.

9 THE COURT: I understand and I -- like I
10 said, I don't have a crystal ball. But I don't think it's
11 going to be a problem. I'm telling you, if it became a
12 problem that I have done as much as fax a letter to the
13 airlines and they make accommodations for the juror.

14 PROSPECTIVE JUROR: I can obey a law, so
15 whatever you tell me to do, I'll do.

16 THE COURT: I just don't think it will be
17 a problem. And if it were to become a problem, then I think
18 we can still get you there by Saturday evening.

19 PROSPECTIVE JUROR: Okay.

20 THE COURT: Okay? With that, Mr. Shook.

21 MR. SHOOK: Thank you, Judge.

22 JAN ANDERSON,
23 having been duly sworn, was examined and testified as
24 follows:

25 DIRECT EXAMINATION

1 BY MR. SHOOK:

2 Q. Ms. Anderson, let me, well, we appreciate you
3 filling out this questionnaire. I'm going to follow up on
4 it just a little bit, but you have been very forthcoming.
5 And, as the Judge said, we're only interested in your honest
6 opinions. And from reading your questionnaire, you look
7 like a pretty straightforward person, so I think we'll get
8 those from you. But if you have any questions at any time,
9 feel free to ask, all right?

10 A. Okay.

11 Q. Looking at your questionnaire, you mentioned
12 this twice and this is not really related to your travel
13 issue, but you do pick up your children from school, at
14 least you did last May. Is that still the situation?

15 A. Yes.

16 Q. What time do you pick them up?

17 A. 3:30.

18 Q. Okay. And are you the sole person that can do
19 that or if we give you -- because what the Judge does, is
20 the jurors are usually here about 8:30 til 4:30 or 5:00.
21 It's like business hours. It kind of works like clockwork.
22 The only time that he can tell you that you won't be out by
23 that time, is if you were in deliberations, either in the
24 guilt/innocence stage or the punishment stage.

25 And we do feel that the trial will last

1 just that two-week period. Would that present a problem for
2 you, your child care issues?

3 A. Yes, because we don't have any family that
4 lives nearby. I don't know. We don't have anybody nearby I
5 could think of to pick them up.

6 THE COURT: How old are your children?

7 PROSPECTIVE JUROR: Eleven and twelve.

8 THE COURT: Well, see, the law didn't
9 give you an exemption.

10 PROSPECTIVE JUROR: I know.

11 THE COURT: I mean, I understand your
12 personal situation, but I, either it fits the law or it
13 doesn't. So, you know, somebody is going to have to help
14 out, if that would be the case. I know he's trying to
15 inquire, but --

16 Q. (By Mr. Shook) Yeah, the -- really what it
17 gets down to this is if you, because the law has to make
18 certain categories, but if something is going on in your
19 life where you would be unable to concentrate, if you were
20 placed on a jury because of something personal going on in
21 your life, we, obviously, would want to know that, too.

22 A. Right.

23 Q. Because everyone is different. And that's the
24 only situation why I asked for that reason, if you'd be able
25 to make those arrangements or is it going to be a situation

1 where they'd be on their own for a couple of hours. And if
2 that were the situation, is that going to cause you a lot of
3 worry so that you wouldn't be able to concentrate on the
4 case. But only you can tell us your own personal situation.
5 But we brought you in early and that's why we want to
6 inquire.

7 A. It may, because my daughter was just recently
8 diagnosed with diabetes, and so I know I would probably be
9 thinking of that. But if it's only an hour or two, I mean,
10 they are 12 and 11, they could stay home.

11 Q. Okay. All right. Well, like I said, we just
12 want to -- you know your situation best, so we depend on
13 your answers there.

14 A. Right.

15 Q. Will she be getting any followup treatment
16 around that time in November or do you know?

17 A. My daughter?

18 Q. Yes.

19 A. Not that I know of.

20 Q. Okay. All right. Let me ask you a few
21 questions on your questionnaire. You had said and I'll turn
22 -- I know there's lots of questions. But on page 5 when we
23 asked about the criminal justice system, we asked kind of an
24 openended question about what your feelings in general are
25 about the criminal justice system and you said that you

1 believe there are some horrible problems that must be fixed,
2 if we're ever to have justice. I would like you to kind of
3 expand on the problems you foresee in the system.

4 A. Well, I just feel like occasionally trials go
5 on too long. I've -- again, I mentioned the only one I ever
6 really followed was O. J. I thought that was horrible, you
7 know. It went on way too long. It was ridiculous. And I
8 don't know, but it doesn't seem to me as if justice was
9 really done.

10 You know, I think there are instances
11 where people get out on probation far too early and repeat
12 the same crime over and over again and I think that's an
13 issue, especially with pedophiles, proven, where they redo
14 it over and over again. I just don't feel that they're
15 safe, that we're safe, when that occurs.

16 Q. Let me ask you your -- oh, there was another
17 question I wanted to ask on your questionnaire is you said
18 your husband had been looking for another job?

19 A. Yes.

20 Q. Is that still the same situation?

21 A. Yes, he's still looking.

22 Q. Okay. Because I know y'all have moved around
23 quite a bit. But as you foresee it, you're not going to be
24 moving out of town in November or anything like that?

25 A. So far, not that we know of. Nobody seems to

1 want to pay for relocation right now, so.

2 Q. Okay. Let me ask you how you feel about the
3 death penalty as a law. Is that a law that you believe in
4 and feel should be enforced?

5 A. Yes.

6 Q. Can you tell us in your own words why you
7 believe in the death penalty and the purpose you feel it
8 serves society?

9 A. Well, it just seems to me that, logically
10 speaking, if you know that you are going to receive death
11 for doing something, it seems to me that would be a logical
12 deterrent.

13 Q. Just a good deterrence for those, for anyone
14 that may considering breaking the law?

15 A. Yes.

16 Q. Do you also feel it could be a just punishment
17 for certain crimes?

18 A. Yes.

19 Q. Okay. What types of crimes do you think from
20 your own personal point of view would be appropriate for
21 consideration of the death penalty?

22 A. Obviously, premeditated murder. I even
23 believe, you know, if they're repeatedly perpetrating a
24 violent act against a woman through rape or a child through
25 molestation, it might be called for, too.

1 Q. A lot of people tell us that, in severe abuse
2 cases, child abuse cases, and also serial rapists in that
3 situation.

4 A. Yes.

5 Q. Now, in Texas, there are only -- right now,
6 the death penalty is just reserved for murder cases and then
7 only certain types, murders that occur with what we call
8 another aggravating fact, such as a murder during a felony.

9 A. Yes.

10 Q. Someone murders someone during the course of a
11 robbery, burglary, rape, or kidnapping, or arson. Also
12 murder of specific victims such as a police officer, fireman
13 on duty, murder of a child under the age of six, murder of
14 more than one victim, and then a hitman situation, someone
15 does it for money. But those are the specific situations
16 that have been reserved for consideration of the death
17 penalty.

18 But another area of the law I want to
19 talk to you about is what we call the law of parties, which
20 is more commonly known as accomplices. Sometimes you have
21 more than one individual commit a crime. A capital murder
22 is no exception. The law says that if someone is an
23 accomplice, if they are helping, actively participating in
24 the crime, that they can be held accountable.

25 An example we give in the capital murder

1 situation is this, using myself and Mr. Wirskye. We decide
2 we want to rob a bank and our plan calls for me to go in
3 there with a gun. I'll hold the tellers up, I'll threaten
4 them and get them to raise their hands. And he goes in with
5 a bag and he fills the money up while I'm keeping the gun
6 covering them.

7 During the course of that robbery, if I
8 intentionally shoot one of them, maybe I don't like them,
9 maybe he tells me they're going for an alarm, and I kill
10 them. We flee. We're arrested. Obviously, I can be
11 prosecuted for capital murder and I could receive the death
12 penalty because I am the actual murderer.

13 A. Uh-huh.

14 Q. The law says, though, that Mr. Wirskye could
15 also be prosecuted for capital murder, and a jury could
16 ultimately find him guilty and even assess the death
17 penalty, depending on his involvement and what they view in
18 the facts, even though he didn't cause the death. People
19 feel differently about that.

20 Some people tell us, I believe in the
21 death penalty, but I would reserve it for the triggerman. I
22 think it's just in those situations and I don't believe in
23 the death penalty for an accomplice, because they didn't
24 actually cause the murder. They might reserve a long prison
25 term for some other crime, bank robbery, or whatever, for

1 that particular individual.

2 We have other jurors that tell us they do
3 think accomplices should be held accountable and should be
4 prosecuted and could ultimately receive the death penalty,
5 depending on the facts.

6 But everybody feels differently and we
7 just want to get your honest opinion on that area of the
8 law. How do you -- how do you feel about the prosecution of
9 an accomplice in a death penalty situation?

10 A. I suppose I'd need to know what that
11 accomplice actually did. For instance, if the accomplice
12 held the person while the person was getting killed or
13 helped hide the body, or, you know, was active in that way,
14 I would say possibly yes. But if the accomplice was saying,
15 no, don't do that, don't do that, you know, I mean, I guess
16 it depends upon the instance.

17 Q. Okay. Well, there's two ways that can be --
18 you can get a conviction. One is if they encourage, direct,
19 aid. That might cover some of the situations you gave. If
20 they said, yeah, kill them, or I want you to go do this,
21 that sort of thing, we are entitled to a conviction of
22 capital murder. But, also, there's another theory called,
23 we call it the conspiracy theory.

24 A. Okay.

25 Q. Basically what that is, is this. If two or

1 more people enter into a conspiracy to commit one felony and
2 one of the conspirators commits another one to help carry
3 that conspiracy out, then all could be held accountable,
4 even if they don't have the intent to commit that other
5 crime.

6 A. Uh-huh.

7 Q. If they should have anticipated that that
8 could happen. Now, the example I gave, the bank robbery,
9 the conspiracy would be Mr. Wirskye and I agreed to commit
10 bank robbery.

11 A. Right.

12 Q. And even though he didn't pull the trigger, he
13 could be found guilty if a jury believes he should have
14 anticipated that could occur. In fact, to get him guilty of
15 the crime under that law, he doesn't even have the intent
16 for that person to die. He could have the opposite
17 situation of the example you gave. He could be saying, well
18 -- he could be saying, don't shoot them, don't shoot them.

19 A. Uh-huh.

20 Q. But if a jury believes he should have
21 anticipated, then he could still be found guilty of capital
22 murder.

23 A. Okay.

24 Q. Okay? And some people disagree with that area
25 of the law. If that accomplice didn't have any intent to

1 kill and was even expressing that or whatever, they don't
2 think that's fair that he's convicted of capital murder.
3 How do you feel about that situation?

4 A. Well, it would probably also depend. If he
5 were carrying a gun, then I would know that he could prepare
6 to kill as well. So, therefore, if he had no gun, I suppose
7 I'd have to hear.

8 Q. Just going to depend on the facts?

9 A. I think so. Yeah, that's a tough one.

10 Q. Well, we can't preview the facts. But all I
11 can ask you, then, really, after describing the law to you,
12 explaining the law, do you feel then an accomplice could be
13 prosecuted for the death penalty and ultimately receive it,
14 depending on his involvement in the facts?

15 A. Well, if that's the law, then yes.

16 Q. Okay. From your own personal point of view,
17 do you agree with the law?

18 A. I think motive has a -- weighs in the decision
19 for me.

20 Q. Okay.

21 A. But if they are carrying a gun and robbing
22 somebody, to me that shows that they are prepared to --

23 Q. Okay.

24 A. -- intervene violently, so, yes.

25 Q. So that goes to their motive and that sort of

1 thing?

2 A. Uh-huh, yeah.

3 Q. All right. Fair enough. Let me ask you this.
4 Now, there's a part on the questionnaire where, on page 3,
5 we ask if you've heard about the case. And this case is a
6 situation that received a lot of publicity and almost every
7 one of the jurors has. And you said you heard about it on
8 the TV news.

9 A. Uh-huh, yes.

10 Q. If you would, just tell us what you remember
11 about the case.

12 A. Actually, not much. Actually, the day that it
13 happened we were shopping in the area and saw a bunch of
14 activity in front of the store and thought, gosh, what
15 happened, you know. And went home and saw it that evening
16 on the news, and that's all I know. I don't know a lot of
17 -- I never followed up.

18 Q. Did you ever, you didn't see what happened
19 afterwards? How any arrests were made, anything like that?

20 A. I didn't follow it, no.

21 Q. Because you've seen something on TV doesn't
22 necessarily make you ineligible to be a juror. The bottom
23 line is this, jurors have to be able to assure the Court
24 that if they are chosen to sit on a jury, they can make
25 their decisions just based on the testimony they hear in the

1 courtroom and not anything they've seen on TV.

2 A. Right.

3 Q. Do you feel you could do that?

4 A. Yes, because I don't even remember much that I
5 saw on TV, so.

6 Q. All right. Now, let's talk a little bit about
7 the procedures in the case. A capital murder trial is
8 divided into two parts. There's the guilt/innocence stage
9 and then there's the punishment stage. The guilt/innocence
10 stage, we have to prove the indictment to you beyond a
11 reasonable doubt. If we fail to do that, then it's a not
12 guilty finding.

13 A. Okay.

14 Q. If we are able to do that, we move to the
15 punishment phase where you may hear additional evidence.
16 And at the close of that evidence, you then get to these
17 Special Issues, which I'll go over in a little more detail
18 in a minute.

19 But, basically, the Special Issues are
20 this. The State must prove beyond a reasonable doubt that
21 the defendant is a continuing danger, that he either
22 intended the person to die or anticipated that they would
23 die, and that the jury doesn't believe there is sufficient
24 mitigating evidence to warrant a life sentence.

25 If they are answered yes, yes, and no,

1 the Judge has no discretion. He would sentence the
2 defendant to death. If they are answered any other way,
3 again, he has no discretion. He would sentence the
4 defendant to life. But those are the only two possible
5 outcomes, once someone has been convicted, the death
6 sentence or a life sentence, and that's determined by how
7 the jury answers those questions. Is that clear to you?

8 A. Yes.

9 Q. Okay. Are you familiar with the method of
10 execution in Texas?

11 A. No.

12 Q. Okay. It's by lethal injection.

13 A. That's what I thought, but I was not sure.

14 Q. It used to be by electrocution, but the law
15 changed and it's now by lethal injection. The procedures
16 are the same in each case. They would be the same in this
17 case, if the defendant were found guilty and these questions
18 were answered yes, yes, and no. The Judge would sentence
19 him to death and he would be placed on death row.

20 At some point in time Judge Cunningham
21 would actually issue a date of execution. The day prior to
22 that date, he would be moved from death row to downtown
23 Huntsville, where by law all executions take place in a
24 prison there. The procedures are the same. On the date of
25 execution, he's housed near the death chamber. He's given

1 an opportunity to have a last meal. He's given an
2 opportunity to meet with family or friends or a religious
3 counselor of his choosing.

4 At 6:00 p.m. by law all executions take
5 place. There's a room there that you may have seen on TV
6 that has a gurney. This is much like a gurney you'd see in
7 a hospital, except that it has leather straps constructed to
8 it. There are two rooms there. There are the viewing rooms
9 where friends of the defendant can view the execution and
10 also friends of the victim, the victim's family.

11 About ten minutes prior to 6:00 p.m. he
12 would be taken into that room. He would be placed on that
13 gurney, by force, if necessary, and secured by those leather
14 straps. Needles would be placed in his arms. The tubes
15 from those needles go to another room where the executioner
16 sits. The visitors or the witnesses are then brought into
17 their respective viewing rooms.

18 At that point in time, the warden gives
19 the defendant an opportunity to make a last statement and
20 these are often reported in great detail in the media. They
21 may proclaim their innocence, they may ask for forgiveness,
22 they may condemn the death penalty as a process. But
23 oftentimes jurors in former cases even read about these
24 things. The general public does.

25 And then the execution takes place, which

1 is simply the signaling of the warden who will inject lethal
2 substances, the executioner will, substances which cause the
3 heart to stop immediately and collapse the lungs. He would
4 be conscious during this process. It takes about 15 to 20
5 seconds. He would then lapse into a coma and die.

6 That's the procedure in each case.

7 That's the procedure in this case. And I must be quite
8 frank with you. I don't mean to be morbid. But it's one
9 thing to talk about the death penalty philosophically and
10 another once you come down here and realize you may be on
11 this jury.

12 A. Yes.

13 Q. But to lay all our cards on the table, that's
14 our goal in this case. We feel we have the type and quality
15 of evidence that would convince a jury of this man's guilt
16 and that these questions would be answered in a way that
17 would result in his execution.

18 We bring a lot of people down here,
19 because people feel differently. We have some that are
20 opposed to the death penalty on moral or religious grounds
21 and can never make that decision. We have other persons
22 that are so adamantly for it, that they could never be fair.
23 We have some people that are for it, but can't make the
24 decision.

25 We have other people that tell us, I'm

1 for it, I feel we need it as a law, but I could not
2 personally make that decision. It would bother me too much,
3 they tell us, quite frankly, to have someone's life in my
4 hands. It's something that would bother me for the rest of
5 my life and that would interfere with my decision-making
6 process.

7 And if they honestly tell us that, then
8 that's fine, too. We have plenty of other jurors to talk
9 to. As best you know yourself, how -- you mentioned in your
10 questionnaire, that was the last question, that it would be
11 a possibly difficult decision for you.

12 A. Definitely it would be difficult. I don't
13 know, you know, is it -- I guess it's the jury, then, that
14 answers those three?

15 Q. That's right.

16 A. So, the jury is the one that's going to decide
17 and not the Judge?

18 Q. The Judge won't decide and the jury doesn't
19 write death or life in. But if you have a yes, yes, and a
20 no, it will result in a death sentence. The Judge has no
21 discretion. So essentially, the jury, obviously, does make
22 that determination.

23 A. I think it would be very unsettling and
24 difficult, but yet I am for the death penalty and I'm for
25 the law. I think it's a good law. So I think by law I

1 could do it. But I certainly don't want to.

2 Q. Most people don't want to. But we just want
3 to make sure that you're okay and feel, as best you know
4 yourself, that you could make that decision when it came
5 down to it. We can't preview the facts, obviously, we can't

6 --

7 A. I've never been placed in that position
8 before. So I, um, I believe if I'm convinced that he was
9 very guilty and all those questions that we asked, if I
10 believe he did that, then I could -- I could make that
11 verdict.

12 Q. All right. Let's talk a little bit about
13 these Special Issues. If you'd take a moment and read
14 question No. 1 to yourself.

15 A. (Prospective juror complies.) Okay.

16 Q. That's the question that the jury is first
17 asked. It starts out with a no answer and we have to prove
18 beyond a reasonable doubt it should be answered yes.

19 A. Uh-huh.

20 Q. It asks the jurors to make a prediction about
21 how the defendant would behave in the future.

22 A. Right.

23 Q. Do you feel comfortable making that type of
24 prediction, if you are given sufficient evidence?

25 A. Well, that's another thing, what I was saying

1 about the justice system. I mean, do they bring up what he
2 was incarcerated for before and past history? I mean, that
3 -- if I'm given all the evidence, then yes. But do they
4 exclude some?

5 Q. That's my -- that was the point of my next
6 question.

7 A. I don't know, you know.

8 Q. What you think -- what kind of information
9 would you want? And I take it a past history would be one
10 of them.

11 A. Sure, because you can't judge that, unless you
12 know what there is a pattern of.

13 Q. That type of evidence is admissible in this
14 portion of the trial in Texas. If a person has been
15 convicted before, they committed crimes, you can hear about
16 that. You can even hear from the witnesses. You can hear
17 what type of sentence they had. You can hear good things
18 about that person, also.

19 A. Right.

20 Q. So, you hear good and bad, and you do get to
21 hear about their background. And, obviously, you get to
22 consider their role in the crime itself and that type of
23 thing, and get to reconsider what you heard in the
24 guilt/innocence stage. If you heard all that, then you feel
25 you could make that assessment, if you are given enough

1 information?

2 A. You can make a guess.

3 Q. Okay. Some people tell us, I could never
4 guess or predict how a person is going to behave in the
5 future. Then other jurors tell us, if I'm given enough
6 information about their background or their role in the
7 crime, then yes, I do feel comfortable answering that
8 question. You feel you could?

9 A. Gosh, it's hard. Yeah, I suppose. I suppose.

10 Q. Well, would you be uncomfortable answering
11 that type of question about whether a person would be -- you
12 would consider them a continuing danger?

13 A. It's hard for me to sit here and say, no, I
14 couldn't do it, because I tend to be very judgmental, or I
15 think that, you know, certain people shouldn't be let out
16 again to do it again, you know, and that kind of thing. So
17 I probably could, would say -- lean one way or the other.

18 Q. Okay.

19 A. Yeah.

20 Q. Let me go over this area of the law. You
21 don't get to this question until the second part of the
22 trial. In other words, you have already determined that the
23 person is guilty beyond a reasonable doubt of capital
24 murder. And then you get to the punishment issues, on
25 whether someone is a continuing danger to society.

1 And, obviously, you get to consider the
2 evidence in the guilt/innocence stage. Now, the law is
3 that, you know, you need to wait and listen to all the
4 evidence that's in the punishment phase and then determine
5 if the State's proven to you beyond a reasonable doubt that
6 the person is a continuing danger to society.

7 A. Okay.

8 Q. We have some people that tell us this, quite
9 honestly, though, if I have in my own mind found him guilty
10 beyond a reasonable doubt of capital murder, that answers
11 question No. 1 for me. In other words, if I think he's a
12 capital murderer and it's proven to me beyond a reasonable
13 doubt, then he is dangerous.

14 A. Sure.

15 Q. The law contemplates that you may have some
16 capital murderers that are a continuing danger and some
17 aren't. In fact, it starts out with a no answer. Some
18 people can follow that law and some people tell us, quite
19 honestly, if I have reached the level of finding him guilty,
20 then the question is answered. Other jurors tell us, no, it
21 wouldn't be answered for me. I'd have to listen to all the
22 evidence and then make that determination. How do you feel
23 about that?

24 A. I would probably need to listen to all the
25 evidence. I mean, just for me, personally, I would think if

1 somebody did that, and murdered somebody, how could they
2 ever do it again? Yet, some can. To me I would think it
3 would be repulsive and horrible so as never to do it again,
4 and I guess it would. You would have to judge how that
5 person is, you know, if they are remorseful or, I suppose I
6 would have to see evidence.

7 Q. You would have to hear more about their
8 background and their role in the crime?

9 A. We're still on No. 1, right?

10 Q. Yes.

11 A. Yes.

12 Q. Okay. We have to prove whether there's a
13 probability the defendant would commit criminal acts of
14 violence. When you see the word "probability" there, what
15 does that mean to you?

16 A. They may or may not.

17 Q. Okay.

18 A. Or they may, the probability is they may.

19 Q. Okay. The law gives us some guidance. We
20 don't have to prove it's a certainty, because I don't think
21 we could ever do that.

22 A. You can't, yeah.

23 Q. It's more than a possibility, though. In
24 fact, the law is often -- the courts have directed in saying
25 more likely than not.

1 A. Uh-huh.

2 Q. Are you comfortable with that type of
3 definition?

4 A. Yes.

5 Q. Okay. We have to prove that the defendant
6 would commit criminal acts of violence. When you see
7 "criminal acts of violence," what types of offenses do you
8 think of?

9 A. Well, again, rape, molestation, murder,
10 assault.

11 Q. Okay. Any type of threats or violence to
12 another human being?

13 A. Sure.

14 Q. And we have to prove, he would constitute a
15 continuing threat to society. What does "society" mean to
16 you?

17 A. Society? People, you know, who you are
18 relating with.

19 Q. Okay. Anyone and everyone he may come into
20 contact with?

21 A. Yes.

22 Q. Including people in the penitentiary system?

23 A. Yes.

24 Q. Okay. Guards, administrators, inmates, that
25 sort of thing. Let me now go to question No. 2. That has

1 to do with that law of parties. If you would, read that to
2 yourself.

3 A. (Prospective juror complies.) Okay.

4 Q. That question has to do with that law of
5 parties situation that we talked about. To get someone
6 guilty, we have to prove that they should have anticipated.
7 Now, we go a step further in the second part. The question
8 asks whether the defendant actually caused the death of the
9 deceased or did not actually cause the death of the
10 deceased, that's the second part. If they didn't actually
11 cause it, but they intended to kill the deceased, so they
12 had that intent there, or another person, or they
13 anticipated that a life would be taken.

14 So if you don't believe the evidence
15 shows that he actually was the triggerman or the murderer,
16 you could still answer the question yes, if you believe that
17 they intended to kill the deceased or another, or they
18 anticipated that a life would be taken. Do you feel that's
19 a good question to have in a death penalty situation?

20 A. Yes.

21 Q. You see how that relates to the accomplice
22 situation we talked about?

23 A. Yes.

24 Q. Now, to get someone guilty, we have to prove
25 that they should have anticipated. But to get to the death

1 sentence, we have to prove that they did anticipate.

2 A. Uh-huh.

3 Q. And, again, it could be all the evidence you
4 heard in the guilt/innocence stage, their role in the crime,
5 plus any additional facts about their background, you can
6 consider. We can't open a person's mind up and show you
7 their intent, but you, as a juror, can infer their intent --

8 A. Sure.

9 Q. -- from their actions. You feel you could do
10 that?

11 A. Yes.

12 Q. Okay. That question starts out with a no
13 answer and then it should be answered yes, if the State
14 proves to you beyond a reasonable doubt that it should be
15 answered yes. Do you feel you could do that?

16 A. Yes.

17 Q. Okay. Special Issue No. 3, if you'd take a
18 moment to read that to yourself.

19 A. (Prospective juror complies.) Okay.

20 Q. That is the last question you get in a death
21 penalty situation. You don't get to this question, unless
22 you've found someone guilty. You would have already found
23 they're a continuing danger to society. And then you felt
24 that they anticipated a life would be taken. And then you
25 get to consider if there's any mitigating evidence in the

1 case.

2 What mitigating evidence is, I can't tell
3 you. It's up to you and the other jurors. It's -- you just
4 have to be able to tell the Court that you can keep your
5 mind open to it, and if you feel there is sufficient
6 mitigating evidence where you think a life sentence should
7 be imposed, you could do that. If you don't think there is
8 sufficient mitigating evidence, you can answer the question
9 no, knowing that that would then result in a person's
10 execution. As you sit there today, can you think of
11 anything that you feel could be mitigating?

12 A. Well, regarding this one or just over all? I
13 need an example.

14 Q. Just your overall feelings.

15 A. Where a life would be more -- would be better
16 than the death penalty?

17 Q. Yes, ma'am.

18 A. Um, sorry, these are hard questions.

19 Q. Well, we know you haven't -- hopefully, you
20 haven't thought about them before.

21 A. Never thought about them before. I just don't
22 think a life sentence -- really, if there was more
23 rehabilitation, it might be a better option, you know, if I
24 felt like --

25 THE COURT: Ma'am, I don't think you

1 understand the question. The question is, can you think of
2 anything that would be mitigating?

3 PROSPECTIVE JUROR: Okay. I suppose if
4 he went in and, let's say, and there was a murder and he
5 said no, no, no, don't do it, don't do it, and he wasn't
6 carrying a gun, perhaps then, that would be an example. Is
7 that right, Judge?

8 THE COURT: No wrong answers. You can't
9 get it wrong.

10 Q. (By Mr. Shook) No wrong answers.

11 MR. SHOOK: Judge, I believe that's all
12 the questions I have.

13 THE COURT: Ms. Busbee?

14 MS. BUSBEE: Yes, may it please the
15 Court? We've reached an agreement on this juror, Your
16 Honor.

17 THE COURT: Ms. Anderson, I guess that
18 was the wrong answer. They've excused you. No, it was an
19 honest answer. They have agreed to excuse you, and I know
20 you are relieved.

21 PROSPECTIVE JUROR: Thank you, yes.

22 MS. BUSBEE: We were worried about your
23 kids.

24 PROSPECTIVE JUROR: Thank you, thank you.

25 THE COURT: And you have child care

1 problems and your husband is out of work and you have so
2 much going on in your life. We want to thank you for your
3 time and service here today and you are free to go.

4 PROSPECTIVE JUROR: All right. Thank
5 you.

6 [Prospective juror out]

7 [End of Volume]
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 STATE OF TEXAS *

2 COUNTY OF DALLAS *

3 I, NANCY BREWER, Official Court Reporter for the 283rd
4 Judicial District Court, do hereby certify that the above
5 and foregoing constitutes a true and correct transcription
6 of all portions of evidence and other proceedings requested
7 in writing by counsel for the parties to be included in this
8 volume of the Reporter's Record, in the above-styled and
9 numbered cause, all of which occurred in open court or in
10 chambers and were reported by me.

11 WITNESS MY OFFICIAL HAND on this the 4 day of

12 March, 2008

13
14
15 Nancy Brewer
16 NANCY BREWER, CSR, NO. 5759
17 Expiration Date: 12-31-04
18 Official Reporter, 283rd JDC
19 Frank Crowley Crts. Bldg. LB33
20 133 No. Industrial Blvd.
21 Dallas, TX 75207
22 (214) 653-5863
23
24
25

REPORTER'S RECORD

74851

VOLUME 25 OF 61 VOLUMES

TRIAL COURT CAUSE NO. F01-00328-T

STATE OF TEXAS * IN THE DISTRICT COURT
VS. * DALLAS COUNTY, TEXAS
PATRICK HENRY MURPHY, JR. * 283RD DISTRICT COURT

GENERAL PANEL QUESTIONNAIRES

FILED IN
COURT OF CRIMINAL APPEALS

MAR 9 - 2004

Troy C. Bennett, Jr., Clerk

On the 30th day of September, 2003, the following
proceedings came on to be heard in the above-entitled and
numbered cause before the Honorable Vickers L. Cunningham,
Sr., Judge Presiding, held in Dallas, Dallas County, Texas.

Proceedings reported by machine shorthand.

ORIGINAL

A P P E A R A N C E S

APPEARING FOR THE STATE

Mr. Toby Shook
SBOT NO. 18293250
And
Mr. Bill Wirskye
SBOT NO. 00788696
Assistant District Attorneys
133 No. Industrial Blvd.
Dallas, Texas 75207
Phone: 214/653-3600

APPEARING FOR THE DEFENDANT

Ms. Brook Busbee
Attorney at Law
SBOT: 03488000
703 McKinney Ave. Ste. 312
Dallas, TX 75202
214/754-9090

Mr. Juan Sanchez
Attorney at Law
SBOT: 00791599
5630 Yale Blvd.
Dallas, TX 75206
214/365-0700

P R O C E E D I N G S

THE COURT: Welcome to the 283rd Criminal District Court. This is Cause No. F01-00328, the State of Texas versus Patrick Henry Murphy, Jr.

I'll introduce the parties at this time. Mr. Toby Shook, Mr. Bill Wirskye, both representing your elected District Attorney, Bill Hill. They are Assistant District Attorneys assigned to this case. Ms. Brook Busbee, Juan Sanchez, representing the defendant, Mr. Murphy.

The Court Reporter here is Nancy Brewer. She has to record everything that we say. And understand we won't be asking for any responses, but please understand that I have to make a record in this case.

You have been impaneled to this case. You come in and you will see there's a questionnaire in front of you. Please don't write anything down on there yet. I will go through that in detail in a few minutes. What we need to do, I need you to pay attention for a brief voir dire from the Court and then we will excuse you to fill out those questionnaires for us. I will read the law to you and tell you what we are doing and why we're doing it. I'll read it straight out of the Code and explain it to you.

"Article 35.17, Section 2. In a capital felony case in which the State seeks the death penalty, the Court shall propound to the entire panel of prospective

1 jurors questions concerning the principles as applicable to
2 the case on trial of reasonable doubt, burden of proof,
3 return of indictment by the Grand Jury, presumption of
4 innocence, and opinion." Those five things I am required to
5 go over with you by law at this time. Then on demand of the
6 State or the defendant, either is entitled to examine each
7 juror on voir dire individually and apart from the entire
8 panel and may further question the juror on the principles
9 propounded by the Court.

10 Let me tell you what all that means.
11 I've got to go through the five issues with you today. That
12 will take me about 15, 20 minutes. Then I'm going to have
13 you return to the hallway to fill out that questionnaire.
14 Then after these questionnaires are submitted, the parties
15 also read them, and then you will be called back to the
16 Court for an individual voir dire. I think my next day is
17 October 15. So it will be two weeks out you will come back
18 to court for an individual opportunity to visit with us
19 about these issues. So that's the game plan.

20 I see a lot of people are like deer in
21 the headlights. I understand it's a lot to hit you with the
22 first thing on Tuesday morning, but that's the way it is.
23 I'll jump right into it.

24 Reasonable doubt. Our country and our
25 criminal justice system is based on the presumption of

1 innocence and reasonable doubt. The State has to prove
2 their case to a jury, any jury in this State, in this
3 country, beyond a reasonable doubt.

4 We don't have a definition on reasonable
5 doubt, but I like to use Cunningham's definition. It's a
6 doubt based on reason and I use common sense. It's not in
7 the definition. There is no definition. But, folks, use
8 your brain. Reasonable doubt. The State has to prove
9 certain elements to you in the indictment that's been
10 returned by the Grand Jury, which I will go over in a
11 minute. Those elements have to be proven beyond a
12 reasonable doubt.

13 How does all that relate in the scheme of
14 things? Well, in a civil case you typically argue about
15 money or a contract or some sort of tort that one party has
16 done or not done to another party. You go to a civil
17 courtroom and the burden of proof is on the plaintiff, the
18 person seeking the money or the relief, is by a
19 preponderance of the evidence. You have got to prove your
20 case by 50 plus something percent. If you can just tilt the
21 scale in your favor, you prevail in a civil case. Why? The
22 issue is typically going to be money.

23 The intermediate standard is a clear and
24 convincing standard. What type case would that be used for?
25 For example, if the State files a lawsuit to terminate your

1 parental rights to your children, it's a much more serious
2 case. You might lose your children. They might be placed
3 with the State and ultimately adopted by someone else
4 against your will. Unfortunately, we have a case that
5 nobody will forget in Dallas County.

6 Do you remember the family that had five
7 children where they locked the little girl in that nasty
8 closet for two years? How could you forget that case?

9 Well, they had five children. They didn't abuse the other
10 four, but they lost the rights to all five children. That
11 was the right thing to do. There's no question about that.
12 That was clear and convincing evidence.

13 Highest burden in our courts is in a
14 criminal case. It's beyond a reasonable doubt because you
15 stand to lose your life or liberty as a result of a
16 conviction. As I have said, the defendant here is on trial
17 for the offense of capital murder. If a person is found
18 guilty of capital murder, there are only two possible
19 punishments, life in prison, or if we go through this
20 procedure, the death penalty is an option for the jury to
21 consider.

22 We have a long way to go before we get
23 there as far as having you understand the law, but that's if
24 you are convicted of capital murder, the State can prove
25 their case beyond a reasonable doubt, there's only two

1 possible punishments, life or death. They have to prove
2 their case beyond a reasonable doubt. So that gives you an
3 idea of the spectrum on how this case fits in. It's not
4 beyond all possible doubt. And it's certainly not proof of
5 one hundred percent.

6 Think about the logic in that. If you
7 require the State to prove their case to you beyond all
8 possible doubt, I want to be one hundred percent sure before
9 I make a decision, you would have to be a witness to that
10 offense and you could not be a juror. Does that make sense?
11 Sure it does. So you have to be able to listen to a witness
12 tell you something and you put the pieces all together and
13 at the of the day the State has removed their doubt in the
14 case, then you have to find the defendant guilty. If the
15 State has not met that burden, you must find him not guilty.

16 Reasonable doubt. Burden of proof, the
17 burden of proof is always on the State and never shifts to
18 the defense. The easy way to say it, those who are doing
19 the accusing have to do the proving. It's real simple. The
20 defendant can sit here and they can do crossword puzzles
21 today and when you come back a couple of weeks from today,
22 they can finish the crossword puzzle and read a book. They
23 don't have to do anything. That's how the situation is set
24 up. We got through fighting a war in the Middle East about
25 how injust the Saddam Hussein regime was. If you made one

1 of his party, Bathe party members, mad they put you in a
2 hole somewhere and left.

3 It doesn't work that way, folks. The
4 State has to prove through an independent, unbiased panel of
5 jurors their case beyond a reasonable doubt. Not like,
6 well, you have got to come in and prove you didn't do it.
7 You have to come in and prove you shouldn't get the death
8 penalty. No, it doesn't work that way. In China they will
9 execute you for tax evasion, unless you can prove that you
10 paid your taxes or have enough money to buy your way out of
11 the system. We don't want that, do we? Okay.

12 Return of the indictment by the Grand
13 Jury. The Grand Jury of Dallas County impaneled by a
14 district court heard this case and returned a true bill of
15 indictment. I will ask a few questions to give you an idea
16 of where we are in the system. Just open this up.
17 Whoever's name it falls on, who is Neil Fredreco Bloan
18 (phonetic). Yes, sir, how many cases do you think the
19 Dallas County Grand Jury returned indictments last year?
20 How many indictments do you think they returned?

21 PROSPECTIVE JUROR: You mean, a
22 percentage?

23 THE COURT: In Dallas County, how many
24 cases do you think they returned indictments, charging
25 instruments, for felonies like murder, rape, robbery, drug

1 cases, theft?

2 PROSPECTIVE JUROR: I have no idea.

3 THE COURT: Give me a guess.

4 PROSPECTIVE JUROR: A thousand.

5 THE COURT: Thousand. Okay. Christina
6 Millison (phonetic), how many cases do you think the Grand
7 Jury returned?

8 PROSPECTIVE JUROR: I can't say, sir.

9 THE COURT: His guess is a thousand.

10 He's low.

11 PROSPECTIVE JUROR: Okay. I'll say two
12 thousand.

13 THE COURT: James Peyton.

14 PROSPECTIVE JUROR: Three thousand.

15 THE COURT: Cynthia Armstrong?

16 PROSPECTIVE JUROR: Seven thousand.

17 THE COURT: Seven thousand. Wolbert
18 Searcy (phonetic).

19 PROSPECTIVE JUROR: Six hundred fifty.

20 THE COURT: Low. Lisa Green.

21 PROSPECTIVE JUROR: Five thousand.

22 THE COURT: Seven is low, going the wrong
23 direction. James Lewis.

24 PROSPECTIVE JUROR: Ten thousand.

25 THE COURT: Diane Nguyen.

1 PROSPECTIVE JUROR: Ten thousand.

2 THE COURT: Low. Andrew Lawson.

3 PROSPECTIVE JUROR: Fifteen thousand.

4 THE COURT: Low. Debra Lawson.

5 PROSPECTIVE JUROR: I would say 75
6 percent of the cases.

7 THE COURT: She's how many were actually
8 indicted versus presented, that's low. Brenda Hall.

9 PROSPECTIVE JUROR: Ninety-nine percent.

10 THE COURT: No. I want to know how many
11 cases, not the percentage of the indictments. Fifteen
12 thousand is low.

13 PROSPECTIVE JUROR: I would say probably
14 thirty-five thousand.

15 THE COURT: Somewhere right around
16 25,000, maybe 25 and 30. I haven't seen the actual numbers.
17 I didn't look it up before I came in today. I give you that
18 perspective and the reason I like hearing from you is that
19 it helps you in what this statement means.

20 Simply by being arrested, confined, or
21 otherwise indicted or charged with an offense gives rise to
22 no inference of guilt at his trial. If you take the amount
23 of time the Dallas County Grand Jury has to meet on each
24 case, divided by the number of cases they returned
25 indictments on or heard, they have about three minutes per

1 case to listen to. So when I tell you that there's been no
2 one no independent panel in Dallas County to review the
3 evidence in this case to any degree, that's exactly what I
4 mean.

5 So you can't come in with the idea of,
6 well, he's been indicted for capital murder. He's good for
7 something. Where there's smoke, there's fire. That simply
8 will not work. An indictment is simply a charging
9 instrument, a roadmap, by which the State files with the
10 Grand Jury and says we believe we have evidence to prove X,
11 Y, and Z. And if it meets the certain constitutional
12 requirements down there, they stamp it true bill and then it
13 comes to a court.

14 So does that give you a perspective of
15 what we're dealing with here? Okay. Presumption of
16 innocence, as I already said, and I can't say this enough
17 because in these cases, well, we know we have an indictment.
18 He must be good for something. Wrong. I'll say this again.
19 The presumption of innocence alone is sufficient to acquit
20 the defendant unless and until the State can prove their
21 case beyond a reasonable doubt. Simply by being arrested,
22 confined, or otherwise charged with an offense, gives rise
23 to an inference of guilt at their trial. Period.

24 You also have to factor into that, and
25 it's not required that I go through that with you at this

1 time, is the defendant has an absolute right under the Fifth
2 Amendment of the United States Constitution and the Texas
3 Constitution that he does not have to testify. That goes
4 back to the fact they don't have to do anything at their
5 trial because the State has the burden. Mr. Murphy can say
6 I am not going to testify and there could be a thousand
7 different reasons why that may or may not occur. It's his
8 right to do so. Advice of counsel. Maybe the State has
9 failed to prove your case. Do not testify. You don't know
10 why. So you cannot go back to the jury room and speculate
11 why.

12 People tell us in a case where the State
13 is seeking the death penalty, well, if he didn't testify, I
14 can't answer these special issues. Well, he's not required
15 by law to testify. In fact, he's -- the law says he does
16 not have to testify. And if he elects to not testify, I
17 will instruct you that you cannot consider that for any fact
18 or circumstance whatsoever against the defendant. That goes
19 back to the burden of proof is always on the State. It
20 makes sense when you look at the big picture. Presumption
21 of innocence, burden of proof never shifts.

22 Last thing is opinion. And that's where
23 we get down to the opinion on these questionnaires is we
24 need your honest and truthful opinions. Were you all sworn
25 in downstairs in the Central Jury Room? I will remind you

1 of your oath that you and each of you do solemnly swear that
2 you will give true answers to all questions concerning your
3 qualifications as a juror in this court. You have already
4 sworn to that.

5 This questionnaire is 17 pages. I know
6 you hate to look at that. It asks what your name is, where
7 were you born, and what happened next. It's pretty
8 comprehensive. Honest and true opinions on those
9 questionnaires will be very helpful. You think how in the
10 world can this help in this case. Well, you will be
11 surprised when you answer these questions. It gives the
12 attorneys a whole lot of insight and will cut down on the
13 amount of time that you will have to come back and spend in
14 this case. Think of it, if they had to ask individually,
15 orally, all of these questions and how long it would take to
16 go through it with all the 65 of you, it would take a while.
17 So that's what we mean.

18 Now, I need to take any questions at this
19 point concerning your qualifications. You should have been
20 asked downstairs. It's extremely important. If you have
21 been arrested for anything, this goes to everybody, make a
22 disclosure on the questionnaire. I don't care if it was for
23 public intoxication 30 years ago when you were in college.

24 Why is it so important? You must be
25 qualified to sit in this case. If we were to put someone on

1 the jury who was not qualified and later found out in this
2 case was a guilty verdict and later on appeal we found out
3 the person was not qualified, we would have to try the case
4 all over again.

5 I know this information that's being
6 requested of you can be very personal at times. There's no
7 other way around it. I can assure you that the
8 questionnaire will remain in the custody of the Court. The
9 parties are able to read it. Then they turn the
10 questionnaires back over to the Court. And the only way,
11 the only way, that a copy of these questionnaires will be
12 made public would be upon an order from the Court of
13 Criminal Appeals.

14 And the only way that is made is these
15 are all digitized. And I had one order from the Court in
16 Austin and I sent them a disk. It's all on a CD and it goes
17 down to the Clerk of the Court in Austin with protective
18 software. That only they can get access to it.

19 So what am I telling you? That your
20 personal information will be kept in the confines of this
21 courtroom in this case. So I know that people are concerned
22 about that. So I'm telling you that I keep a very tight lid
23 on it. At the end of the day the Sheriff will come around
24 and collect the questionnaires that we're completed. I
25 print them in the morning you come back and you will get a

1 copy of it and it is still warm. I copy it from the bench.
2 You will have it there and I shred it at the end of the day.

3 I'm very sensitive with the personal
4 information. And we use the proper controls to manage this
5 process. So I'm going to call the names of the individual
6 jurors. We have an extra person here. And now I want you
7 to take your questionnaire and then at the top right-hand
8 corner on your questionnaire, there will be a place for the
9 juror number. When I call your name, I want you to raise
10 your hand and I'll give you the number to put on there and
11 immediately go and put the number on each page, front and
12 back. There should be pens placed on the clipboard.

13 The idea is I have 65 people times 17
14 pages and there's a lot of pages. They are not stapled.
15 They are clipped. You lose a few clips and it's a mess, if
16 they get mishandled. So if you will, he's going to pass out
17 the pens. I'm going to call the names of the individuals.
18 I'll give you your juror number. Write the juror number on
19 the top right-hand corner of the page and each page front
20 and back, because these will be scanned, each page, the
21 number. Okay.

22 [Off the record]

23 THE COURT: Counsel, please approach.

24 (Bench conference)

25 THE COURT: All right, folks. What I

1 want to admonish you, please, please, put that number on
2 each page right now before you go any further with answering
3 your questionnaire, so we don't lose it.

4 You will be receiving a letter from the
5 Court with a date by which to appear. I will try to give
6 you as much notice as I can. If you have e-mail, I would
7 prefer to contact you via e-mail, so please write clearly
8 and legibly your E-mail address. As you can see, I'm kind
9 of a computer geek. I understand that. But I can E-mail
10 you and give you as much notice as we can.

11 If you are invited to come back, we
12 schedule people in the morning and the afternoon. So your
13 next down -- the next time down here will be no more than a
14 morning or afternoon. We start at 8:30 or at 1:30. So that
15 would be the next opportunity for you to come back down
16 here. Please write legibly. The quickest way to get back
17 down here is not to fill out your questionnaire legibly or
18 completely, they can't read it.

19 So please come in and tell us what you
20 were thinking about. I know that you are uncomfortable
21 packed back in here, so I would invite you to go back out in
22 the hallway and spread out in the hall. And when you have
23 completed your questionnaire, give it to the Sheriff and
24 then you are free to go, subject to recall by this Court.
25 Any questions? Great. Thank you.

[End of Proceedings]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

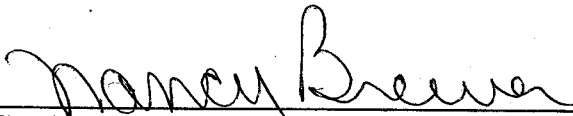
1 STATE OF TEXAS *

2 COUNTY OF DALLAS *

3 I, NANCY BREWER, Official Court Reporter for the 283rd
4 Judicial District Court, do hereby certify that the above
5 and foregoing constitutes a true and correct transcription
6 of all portions of evidence and other proceedings requested
7 in writing by counsel for the parties to be included in this
8 volume of the Reporter's Record, in the above-styled and
9 numbered cause, all of which occurred in open court or in
10 chambers and were reported by me.

11 WITNESS MY OFFICIAL HAND on this the 4 day of

12 March, 2004.

13
14 
15 NANCY BREWER, CSR, NO. 5759
16 Expiration Date: 12-31-04
17 Official Reporter, 283rd JDC
18 Frank Crowley Crts. Bldg. LB33
19 133 No. Industrial Blvd.
20 Dallas, TX 75207
21 (214) 653-5863
22
23
24
25

REPORTER'S RECORD

74851

VOLUME 26 OF 61 VOLUMES

TRIAL COURT CAUSE NO. F01-00328-T

STATE OF TEXAS * IN THE DISTRICT COURT
VS. * DALLAS COUNTY, TEXAS
PATRICK HENRY MURPHY, JR. * 283RD DISTRICT COURT

INDIVIDUAL VOIR DIRE

FILED IN
COURT OF CRIMINAL APPEALS

MAR 9 - 2004

Troy C. Bennett, Jr., Clerk

On the 1st day of October, 2003, the following
proceedings came on to be heard in the above-entitled and
numbered cause before the Honorable Vickers L. Cunningham,
Sr., Judge Presiding, held in Dallas, Dallas County, Texas.

Proceedings reported by machine shorthand.

ORIGINAL

A P P E A R A N C E S

APPEARING FOR THE STATE

Mr. Toby Shook
SBOT NO. 18293250
And
Mr. Bill Wirskye
SBOT NO. 00788696
Assistant District Attorneys
133 No. Industrial Blvd.
Dallas, Texas 75207
Phone: 214/653-3600

APPEARING FOR THE DEFENDANT

Ms. Brook Busbee
Attorney at Law
SBOT: 03488000
703 McKinney Ave. Ste. 312
Dallas, TX 75202
214/754-9090

Mr. Juan Sanchez
Attorney at Law
SBOT: 00791599
5630 Yale Blvd.
Dallas, TX 75206
214/365-0700

PROSPECTIVE JUROR INDEX

<u>PROSPECTIVE JUROR</u>	<u>CRT.</u>	<u>STATE</u>	<u>DEFENSE</u>	<u>VOL.</u>
Grace Evans	4	5	36	26
Linda Rowell	41	43,95	75,96	26
Mark Poole	99	100	136	26
Hardy Walker, Jr.	145	146	177	26
Sandra Barron	194	196	236	26
Nancy Wilkey	241	242,271 276	261,274 290	26

PROCEEDINGS

1 THE COURT: Ms. Grace Evans.

2 [Prospective juror in]

3 THE COURT: Good morning.

4 PROSPECTIVE JUROR: Good morning.

5 THE COURT: How are you?

6 PROSPECTIVE JUROR: Okay.

7 THE COURT: We have juror No. 2816, Ms.

8 Grace A. Evans; is that correct?

9 PROSPECTIVE JUROR: That's right.

10 THE COURT: Ms. Evans, welcome to the
11 283rd. I see that you have the guide. Have you had enough
12 time to read that a couple of times through?

13 PROSPECTIVE JUROR: Oh, sure, uh-huh.

14 THE COURT: And we also provided a copy
15 of the questionnaire that you filled out for us back in May.
16 Please don't think you've got to understand it all right
17 now. This is an opportunity for the attorneys to visit with
18 you about these issues, go over the law, and help you
19 understand how it all relates. There are no wrong answers,
20 just honest truthful answers.

21 And if you have any questions, please ask
22 us. This is the only time that we have to visit with you
23 individually. Some people come in a little nervous and
24 that's expected. This is as informal a process as we can
25 have. It's a whole lot better than having you out one of

1 700 people. There's no meaningful way that we can have voir
2 dire with that.

3 So, if you would, just try to -- the big
4 picture I've got to have at the end of this interview is do
5 you understand the law and can you follow it? That's the
6 questions I have to ask at the end. The only question I
7 have for you at this time is will you be able to serve this
8 Court for a period of two weeks beginning on November 10th?

9 PROSPECTIVE JUROR: As far as I know.

10 THE COURT: Thank you very much.

11 Mr. Wirskye, would you like to inquire?

12 MR. WIRSKYE: May it please the Court?

13 GRACE EVANS,

14 having been duly sworn, was examined and testified as
15 follows:

16 DIRECT EXAMINATION

17 BY MR. WIRSKYE:

18 Q. Ms. Evans, how are you this morning?

19 A. I'm okay.

20 Q. Okay. Thanks for bearing with us. My name is
21 Bill Wirskye and I'll be the Assistant DA that will be
22 visiting with you for the next few minutes. I know it's a
23 little bit unnatural, since we have you up on the witness
24 stand. People tend to think that they're the one on trial.
25 But since this is a case where the State is seeking the

1 death penalty, the law allows us to talk to jurors
2 individually, and this is just kind of the best system we
3 have, so, to the extent possible, relax. There are no right
4 or wrong answers.

5 A. Okay.

6 Q. What I'd like to do with you is follow up on
7 some of the information in your questionnaire, talk to you a
8 little bit about your thoughts and feelings on the death
9 penalty, and then, finally, talk to you about the law, make
10 sure you understand the law, and can follow the law. If you
11 have any questions at all or if I'm ever unclear, just stop
12 me and let me know and I'll try to rephrase. You're a
13 teacher at Berkner, right?

14 A. Well, I left Berkner. I retired this summer
15 and now I'm at Lake Hill Prep.

16 Q. Oh, okay.

17 A. I'm still teaching, but --

18 Q. What do you do at Lake Hill Prep?

19 A. I'm teaching biology.

20 Q. Okay. We know it's an inconvenience, if you
21 had to be down here for two weeks in November, but looks
22 like from what you told the Judge, you could do it if you
23 had to?

24 A. I mean, I can get a substitute.

25 Q. Okay. No one is ever happy about it, but, you

1 know, I think most people understand it is their duty --

2 A. Right.

3 Q. -- if they're chosen, so. You have a son
4 that's an attorney; is that right?

5 A. Yes.

6 Q. What type of law does he practice?

7 A. He's in health law.

8 Q. Okay. Does he work here in Dallas?

9 A. He's in Houston.

10 Q. Okay. He doesn't do any type of criminal law
11 or anything like that?

12 A. No.

13 Q. And you have a daughter that's an FBI analyst,
14 right?

15 A. Right.

16 Q. Where is she based out of?

17 A. She's here in Dallas.

18 Q. Okay. What does she do for the FBI?

19 A. She's an analyst. That's really all I know.

20 Q. Like physical evidence, like trace evidence,
21 or just more intelligence analyst?

22 A. I think she does data base, that kind of
23 thing, a lot of computer work.

24 Q. Okay. And your husband is retired FBI?

25 A. Yes.

1 Q. Okay. How long has he been retired from the
2 FBI?

3 A. I think it's seven years now.

4 Q. Okay. And looks like y'all may have moved
5 around a bit. Was that due to --

6 A. We did, we did. We enjoyed that for a long
7 time.

8 Q. Going to different field offices, that type
9 thing?

10 A. Right. Right.

11 Q. Okay. He's retired now and is a private
12 investigator?

13 A. Uh-huh.

14 Q. What type of work does he do now?

15 A. He does background investigations pretty much
16 for the State Department and the Air Force.

17 Q. Oh, okay. So he's still working kind of on
18 contract, I guess?

19 A. Right. Right.

20 Q. Okay. Is there anything about having a son
21 that's an attorney and a daughter that works at the FBI and
22 a husband that used to work at the FBI that would --
23 anything about that that would make it difficult for you to
24 be fair and impartial to both sides?

25 A. I don't think so.

1 Q. Okay. Obviously, I think one of the concerns
2 of both sides is that we get somebody over there in the jury
3 box that has some sort of hidden agenda and can't be fair,
4 and, you know, it wouldn't be fair to either side, very
5 frankly.

6 A. I understand.

7 Q. So that's why we ask the questions.

8 A. Sure.

9 Q. You told us generally you were in favor of the
10 death penalty for certain crimes; is that right?

11 A. Uh-huh.

12 Q. What purpose do you think it serves or why do
13 you think we should have the death penalty for certain cases
14 in our society?

15 A. Well, I think there has to be an ultimate
16 consequence for some things.

17 Q. Okay. When you think about an appropriate
18 type of case for the death penalty, does a particular
19 scenario or fact situation come to mind, a particular type
20 of crime?

21 A. Pretty much harm to a child would be something
22 that would trigger me. And murder, it would be the
23 circumstances of the murder. But I can certainly see that
24 it could be.

25 Q. Is there any particular crime you may have

1 followed, a high profile, high media case, that you may have
2 heard, read about, seen about, that comes to mind when you
3 think about the death penalty?

4 A. Nothing really comes to mind. If you ask me,
5 I'm sure I would remember.

6 Q. If it were up to you, would you reserve the
7 death penalty just for murder cases?

8 A. Well, mistreatment of a child would go in
9 there, also.

10 Q. Okay. In Texas, and you've had a chance to
11 look at it now, although sometimes the way it's laid out is
12 kind of confusing in that packet, the law, but we reserve
13 the death penalty just for murder cases and then only a
14 certain subset or group of murders.

15 One way to think about it is it's always
16 a murder plus something else. If you murder a police
17 officer or fireman, prison guard on duty, a child under six.
18 If you commit an intentional murder during the course of
19 committing another crime, like burglary, rape, robbery, that
20 type of thing. Those are capital crimes.

21 Mass murder, serial murder, murder for
22 hire, you kill somebody for money, or you hire somebody to
23 kill your spouse or business partner, those type crimes are
24 what we reserve the option of the death penalty for in
25 Texas. Does that list or group kind of meet with your

1 approval, I guess? Does that sound like a pretty fair list
2 to you?

3 A. Well, again, I just, it would be the
4 circumstances involved. But I can see, you know, the
5 rationale.

6 Q. Okay. I know we asked people how strongly
7 they feel about the death penalty on a scale of 1 to 10, and
8 you gave yourself an 8, which is towards the high end. And
9 we kind of know that that means different things to
10 different people.

11 A. Right.

12 Q. But it sounds like, depending on the
13 circumstances, you could keep an open mind. You could see
14 giving a life sentence for a capital murder, I guess?

15 A. Probably could.

16 Q. Is there a particular circumstance that might
17 be important --

18 THE COURT: Ma'am, I'm sorry to
19 interrupt. You've got to speak up a little bit, number one.
20 And, number two, you've got to say yes or no and make a
21 verbal response, because she's recording everything that we
22 say.

23 PROSPECTIVE JUROR: All right. I'll do
24 better.

25 Q. (By Mr. Wirsky) You know, talking about

1 those circumstances, is there a particular circumstance that
2 you have in mind when you think about the death penalty?

3 A. Repeat. I lost your focus. I lost focus.

4 Q. Okay. We were talking about, you know,
5 depending on the circumstances, I guess, would decide in a
6 capital case, and is there something particular you have in
7 mind, a particular circumstance, or particular factor? I
8 know we talked about crimes against children, but --

9 A. Certainly premeditated murder, that would be
10 something that to me would justify the death penalty.

11 Q. Okay. Probably like me you grew up hearing
12 about premeditated murder. In Texas, what we have is
13 intentional murder, which means, you know, that it was the
14 conscious objective or desire to do something. And in
15 Texas, intent can be formed in an instant.

16 I think when most people think about
17 premeditation, they think about somebody that planned or
18 thought about it, that type thing. And that's certainly a
19 factor you can take into account when you look at a case.
20 But it's not necessarily a prerequisite for murder or
21 capital murder, that type thing.

22 Let me ask you this. I think when we
23 think of capital murder, we think of just maybe the lone
24 individual going in and robbing a 7-Eleven, maybe killing
25 the clerk or that type thing. But as you can probably well

1 imagine, oftentimes crimes are committed by more than one
2 person. A group of individuals can commit any crime, you
3 know, all the way from shoplifting all the way up to capital
4 murder. And the law allows us to prosecute everyone that
5 was actively involved in a crime for that crime.

6 And when you're talking about a capital
7 murder, you may have a scenario where you just have one
8 person that, say, actually pulled the trigger of the gun.
9 Call him the triggerman, the person that actually caused the
10 death. And you may have other people that were actively
11 involved, accomplices, nontriggermen that could also be
12 prosecuted for that case.

13 And some people we talk to kind of make a
14 distinction between those two classes, the triggerman and
15 the nontriggerman accomplice, and if it were up to them, you
16 know, they may believe very strongly in the death penalty
17 for the triggerman, but if it were up to them, they would
18 take the death penalty off the table for the accomplices.
19 For whatever reason, religious, moral, ethical, they just
20 don't ever think a death sentence would ever be justified
21 for an accomplice who didn't actually cause the death.

22 Some people tell us no, you know, it just
23 kind of depends on the facts and circumstances. But what do
24 you think about that type of situation, the triggerman
25 versus the accomplice?

1 A. I think they would all be responsible.

2 Q. Okay.

3 A. So would that be a yes answer?

4 Q. Okay. Would you automatically take the death
5 penalty off the table for the accomplice?

6 A. No.

7 Q. Okay. Why do you say that?

8 A. If it was a plan and they were all involved,
9 then they are all responsible.

10 Q. Okay. And that's pretty much what the law is.
11 Just to give you an example to kind of illustrate the law we
12 have in Texas, how those accomplices can be held, be found
13 guilty of capital murder and ultimately face the death
14 penalty, say the other prosecutor and myself, Mr. Shook,
15 decide we're going to rob a bank. The plan is for him to go
16 in with a gun. He's going to hold the tellers at bay while
17 I go in unarmed, kind of with a big bag, and empty out the
18 cash drawers. I'm going to be the bag man.

19 And we go and do that bank robbery and,
20 say, for whatever reason, maybe one of them looks at
21 Mr. Shook funny or we see one of them kind of going for a
22 silent alarm, and I tell him that, but for whatever reason
23 he shoots and kills one of the tellers.

24 He's committed an intentional murder in
25 the course of a robbery. He can be found guilty of capital

1 murder and ultimately face the death penalty. And the law
2 says I could as well, depending on the facts and
3 circumstances. And that kind of sounds like where you are
4 in that situation; is that right?

5 A. Yes.

6 Q. Okay. The law says if I actively help him,
7 direct him, encourage him to participate in the crime, I'm
8 just as guilty. I could face the death penalty. Or, also,
9 kind of under the law of conspiracy, since we conspired or
10 agreed to commit a bank robbery, and during that bank
11 robbery somebody gets killed, the law says if the accomplice
12 should have anticipated that a life could be taken, then he
13 can be found guilty of murder. Does that kind of make sense
14 to you?

15 A. Yes.

16 Q. And a lot of people say, you know, we made
17 this plan, your buddy, to go into a bank robbery with a
18 loaded gun. I should have anticipated that somebody could
19 get killed. Does that make sense?

20 A. Yes.

21 Q. Okay. The reason I go into it at length, to
22 be very frank with you, is that is the theory of law that
23 we're prosecuting this case under, Mr. Murphy, as an
24 accomplice. And that's why we spend so much time talking to
25 people, to make sure they understand the law and they agree

1 with the law and can follow the law.

2 Obviously, if we get somebody over there
3 in the jury box who has some reservation about that
4 particular aspect of the law, it's too late at that point.
5 But it sounds like you could at least keep an open mind and
6 be able to follow that law of accomplices, that type of
7 thing; is that right?

8 A. Correct.

9 Q. Okay. Now, I know you've been on a jury
10 before. I think it was a while ago, maybe '85; is that
11 right?

12 A. As best I can remember.

13 Q. A robbery case?

14 A. Uh-huh.

15 Q. What do you remember about that case?

16 A. It was a person at Baylor Hospital that was
17 going in rooms and taking patients' personal items.

18 Q. Okay. Did you find the person guilty? Do you
19 remember?

20 A. Yes.

21 Q. Okay. In your opinion was the evidence pretty
22 straightforward?

23 A. Yes.

24 Q. Did the person testify in their own defense?

25 A. No.

1 Q. Okay. Was the jury asked to set punishment
2 for the person?

3 A. No.

4 Q. Okay. I guess the Judge did that?

5 A. Uh-huh.

6 THE COURT: Once again, ma'am, I know
7 you've probably never been on the witness stand before. But
8 "uh-huh", she can't write that. It's normal, but --

9 A. Oh, all right. My answer is yes.

10 Q. (By Mr. Wirskye) Now, anything about that
11 experience that in the back of your mind you're thinking, I
12 don't want to do that again, I don't want to go through that
13 again, or anything about that jury duty?

14 A. No. No.

15 Q. Okay. Let me talk to you a little bit about
16 the publicity in this case. I think, like almost everybody
17 we talked to, you've heard something about this case. It
18 was, obviously, a high profile case. And we talk to
19 everybody to see how that may affect them.

20 Just because you've heard about the case
21 through the media or otherwise, does not automatically
22 disqualify you as a juror. In order to be qualified, kind
23 of what we ask a juror to do, even though they may have
24 formed some opinions or formed some impressions about the
25 case, as long as they can kind of push that to the back of

1 their mind, not forget about it -- we can never ask you to
2 forget about it.

3 But as long as you could push that to the
4 back of your mind and be able to tell us that you could base
5 your verdict in this case just on the evidence that you hear
6 in the courtroom, because, obviously, that is the best
7 source of information in a case. If you could do that, you
8 would be a qualified juror.

9 Is that something you think you could do,
10 just base your verdict on the evidence that you hear in the
11 courtroom?

12 A. I come from scientific training, so I hope I
13 can do that. My answer would be yes.

14 Q. Okay. What do you remember hearing about this
15 case?

16 A. Well, I read the paper. I certainly remember,
17 you know, it was about Christmas time maybe, just, you know,
18 outrage from the community that this had happened and they
19 were trying to find the guys.

20 Q. Okay. Do you remember hearing any of the
21 details of the crime or the capture or anything like that?

22 A. I believe they found them in Colorado.
23 They've been there. That's about all I remember.

24 Q. Okay. Have you kept up with any of the
25 subsequent court proceedings?

1 A. Just, I remember guilty, guilty, a lot of
2 guilty verdicts.

3 Q. Okay. Sounds like you don't have a lot of
4 details of the crime or details about particular people or
5 that type thing; is that right?

6 A. No. No.

7 Q. Nothing real detailed that might affect you
8 potentially in your ability to be fair to both sides and
9 just listen to the evidence and base a verdict just on that
10 evidence?

11 A. Correct.

12 Q. Okay. In Texas, all trials, even capital
13 murder trials, are kind of done in two parts. The jury that
14 you sat on, you just participated in the first part. But
15 the first part is guilt/innocence. And that's when a jury
16 decides whether we prove to you what we allege the crime
17 was, if we prove to you what's in our indictment, whether
18 the person is guilty or not of that crime.

19 And that's the portion you served on in
20 your trial. If the person is found guilty of capital
21 murder, then we move to the second phase of trial, which is
22 the sentencing phase. The rules of evidence broaden out a
23 little bit. You get to hear extra, additional information,
24 about his background, character, reputation, criminal
25 history, if it exists, good things, bad things. And we let

1 you hear this extra information, because we ask you to
2 answer three questions to determine the sentence in this
3 type of case.

4 The only possible sentences for capital
5 murder in Texas are a life sentence or a death sentence.
6 And we don't ask a juror to write in life sentence or death
7 sentence. What we do is ask the jury to answer those three
8 questions that I think you looked at and they are up on the
9 board here. And just to run over them briefly, I'll talk to
10 you more about them in a little while.

11 But that first question we ask a juror,
12 is the person basically a future danger to society? If
13 that's answered yes, then you move on to the second Special
14 Issue, which is kind of the accomplice scenario that we
15 talked about, where you have to find at the very least that
16 they anticipated that a human life would be taken. And if
17 that's answered yes, you move on to the final Special Issue
18 which is what we call the mitigation question.

19 It's basically a chance for a jury to
20 step back, look at everything, and see if there's some
21 reason there that his life ought to be spared. It lets a
22 jury exercise mercy, I guess, is one way to look at it. And
23 if that's answered no, that there is nothing mitigating,
24 then the Judge has no discretion. The person will be
25 sentenced to death. It's the same way in every case.

1 Sometimes we talk to people who are very
2 strongly in favor of the death penalty philosophically or in
3 the abstract, and when they get down here it kind of becomes
4 a little more real to them. And we realize this is not
5 necessarily everyone's cup of tea to participate or to be on
6 a death penalty jury. And we want to make sure that at
7 least before people go into the process, they have no
8 hesitations about participating in the process.

9 Obviously, no one wants to. Obviously,
10 no one is, you know, comfortable doing it. But we want to
11 make sure there's not any hesitations and that type of
12 thing. Are you familiar with our method of execution in
13 Texas?

14 A. I'm thinking the gas chamber.

15 Q. It's lethal injection.

16 A. Lethal injection.

17 Q. Actually, the law changed a few years ago and
18 we have lethal injection. The procedures are the same in
19 every case as I said. They'd be the same in this case. If
20 those questions are answered yes, yes, and no, the Judge
21 would have no discretion. He would sentence the person to
22 death.

23 The person would be taken immediately
24 down to Texas death row where he'd wait until some point in
25 the future. I can't tell you how long or when, but at some

1 point in the future Judge Cunningham would issue a date of
2 execution. On that day the person would be taken from death
3 row to Huntsville, Texas, where our main prison is, and be
4 held in a small holding cell outside the death chamber for
5 that day.

6 He would be given a chance to meet with
7 friends, family members, a spiritual advisor. He'd be given
8 a chance for a last meal, if he can eat it. As it got close
9 to 6:00 in the afternoon, he'd be taken from that holding
10 cell to the death chamber, voluntarily or involuntarily.
11 Guards are trained to take them, if they don't want to go.

12 You may have seen the death chamber.
13 It's oftentimes shown in the media, a small room with a
14 gurney. He'd be taken in there, strapped down to the gurney
15 with leather straps. An IV would be placed in his arm.
16 There would be witnesses for his side. There'd also be
17 witnesses there for the victim's side.

18 The warden would give him a chance to
19 make a last statement. He may be very defiant, proclaim his
20 innocence to the very end. He may be very contrite, and beg
21 for forgiveness for his crime. But after he's given a
22 chance to make that statement, the warden would signal the
23 executioner who would release a series of chemicals into the
24 IV that would very quickly shut down his heart and lungs.
25 He'd lose consciousness and fall into a coma and die very

1 shortly after that.

2 And I kind of go over those details, not
3 to be morbid with you, but those are often the type of
4 details that are reported in the paper. Some jurors worry
5 about that, having that on their conscience, looking forward
6 to that day, if it ever happened. And that's why we go
7 through this again, to make sure that you're not only
8 comfortable with the death penalty philosophically, but you
9 have no hesitation about participating in this process.

10 And only you know yourself better than
11 anyone. We just want to make sure that you feel you're the
12 type person who could take pen in hand and answer those
13 three questions in such a way that would ultimately result
14 in the death of another human being.

15 A. It would be very hard.

16 Q. Do you think you're the type that could
17 participate in that process?

18 A. I think out of civic responsibility, I could.

19 Q. Okay. And that's why we ask it. Again, we
20 know it's not everyone's cup of tea and we want to make sure
21 that, you know, there's no hesitation going into it. From
22 what I hear you say, you could do it, if called upon to
23 serve; is that right?

24 A. Yes.

25 Q. Okay. Let's talk a little bit about these

1 Special Issues, kind of in a little more detail. As I said,
2 the jury only considers these at the very end of the trial.
3 If you found the person guilty of what they're charged with,
4 capital murder, you go into that second phase.

5 The law envisions that all jurors kind of
6 start that second phase with an open mind. Even though you
7 found him guilty, you've got to have an open mind to these
8 questions. You can't go in with any preconceived answers or
9 automatically answer these questions until you've heard the
10 evidence in the second part of the trial. Does that make
11 sense to you?

12 A. Yes.

13 Q. And we give you that extra evidence to help
14 you answer these questions. And if you could take a second,
15 I know you've looked at them in the packet, but if you could
16 take a moment or two and read through those three questions
17 just to yourself. They're phrased a little bit differently.

18 We always tell people we did not draft
19 these questions, your Legislature did in Texas. They're a
20 little lengthy and wordy, but if you could just look at
21 those real quick.

22 A. Talk to me a little bit about No. 2.

23 Q. I'm sorry?

24 A. No. 2, I'm not clear about that one.

25 Q. No. 2, again, remember we talked about that

1 accomplice scenario?

2 A. Uh-huh.

3 Q. And that's what that question deals with.

4 Basically that question boils down to three different parts.

5 If you think the person actually pulled the trigger in our
6 example, actually caused the death, you would answer it yes.

7 That's the first part of the question. Or if you think the
8 person didn't actually cause the death, but intended that
9 that person or another die, okay?

10 A. Okay.

11 Q. You would answer yes. You know, maybe in my
12 scenario, if I said, Mr. Shook, she's going for the alarm,
13 shoot and kill her. Obviously, I intended that death, but I
14 didn't actually cause it. And finally that last clause
15 there, that last line, anticipated that a human life would
16 be taken. That's kind of a followup to what we've already
17 talked about.

18 If you'll recall, in order to find an
19 accomplice guilty of capital murder, the law is that the
20 person should have anticipated that a life would be taken.
21 In order to answer this question, the law imposes a little
22 bit higher burden and says not only did they should have
23 anticipate, but did they actually anticipate that a death
24 would happen. And if you believe through the evidence that
25 the person actually anticipated that a death would happen,

1 then you would answer that question yes. Does that kind of
2 make sense to you?

3 A. Yes.

4 Q. Okay. And, obviously, you know, we can't, you
5 know from your past experience, a person can't be forced to
6 testify in his own defense. You may not hear from the
7 person. There's not a machine to kind of read people's
8 minds, what exactly they were thinking or what they were
9 anticipating.

10 You just kind of look, I guess, at the
11 actions, that type of thing, and draw some inferences or
12 conclusions based on that evidence to answer that question,
13 whether you think they anticipated. Does that make sense to
14 you?

15 A. Yes.

16 Q. Do you kind of see that distinction between
17 should have anticipated and did anticipate?

18 A. Yes.

19 Q. A quick example I give on that sometimes is
20 when my dad bought me my first car at 16. I drove it like a
21 madman for about a month before I ultimately wrecked it.
22 And he was really mad at me and said, you know, you fool,
23 you should have anticipated driving like that, you were
24 going to wreck that car, which is true. Looking back I
25 should have anticipated, but I didn't actually anticipate,

1 because I was too young and too stupid.

2 And I sometimes use that to point out
3 that difference between should have anticipated and actually
4 did! It's just a little higher standard before we get to
5 the death penalty. Is that something you're comfortable
6 with?

7 A. Yes.

8 Q. Okay. Question 2 and Question 1 are similar
9 in this sense. They both start out with a no answer.
10 That's kind of the default setting on those questions, and
11 the answer to those questions remains no, unless the State
12 can prove to you beyond a reasonable doubt that the answer
13 should be yes, okay? It's part of our burden of proof to
14 prove to you that both of those questions should be answered
15 yes. If you don't feel we've proved it, if you don't feel
16 we've met our burden of proof, the answer stays no. Does
17 that make sense to you?

18 A. Yes.

19 Q. Okay. Let's look at Special Issue No. 1 real
20 quick, whether there's a probability that the person would
21 commit criminal acts of violence, such that they'd be a
22 continuing threat to society. You see how that question
23 kind of asks a jury to make a prediction about future
24 behavior?

25 A. Yes.

1 Q. Is that something you think you're comfortable
2 with, making that sort of prediction, given enough
3 information?

4 A. I don't know that I can give a yes or no
5 answer.

6 Q. Is there something you think you'd like to
7 hear, some type of evidence to help you answer that
8 question, if you had to?

9 A. Well, you know, usually it does seem that
10 behavior does continue in a certain pattern, but that's not
11 an absolute.

12 Q. Sure. A lot of people tell us that. I guess
13 the best predictor of future behavior is past behavior.
14 They may want to hear about the person's past, his criminal
15 past, if he has one, that type thing, to help them answer
16 that question. Assuming you're given that type of evidence
17 in the second part of the trial, do you feel comfortable
18 making that sort of prediction?

19 A. I don't know that I'd feel comfortable, but I
20 think I could.

21 Q. Okay. A lot of the words in these questions
22 aren't necessarily defined for us in law, like so many other
23 things are, so we kind of just rely on the jurors to use
24 their good common sense and kind of give it the everyday
25 definition. You know, we always ask jurors, when you see

1 that word "probability," I almost hesitate to do it with
2 you, since you're a math science type teacher, but what does
3 the word "probability" mean to you?

4 A. Well, that you are looking at, the
5 preponderance of the data.

6 Q. That's exactly right. And we hear that, you
7 know, preponderance, more likely than not, a likelihood.
8 Obviously, we don't have to prove to a certainty. We could
9 never do that. But it's got to be something more than a
10 mere possibility. A lot of people say preponderance, 51
11 percent of the evidence, that type thing.

12 The phrase, kind of in the middle line of
13 that question, "criminal acts of violence." Again, that's
14 not specifically defined or limited to certain type of acts
15 or crimes. But I'm just curious what comes to mind when you
16 see that phrase? What type of acts or what type of crimes?

17 A. Well, if this is a murder trial, I guess I
18 would think murder.

19 Q. Murder, obviously would be one.

20 A. Robbery, rape.

21 Q. That's kind of what we commonly hear. Any
22 type of violent crime or the threat of violence, a crime
23 that involves that, that type thing. Does that make sense
24 to you?

25 A. Yes.

1 Q. Okay. The law doesn't necessarily require
2 that we prove to you that he's going to commit another
3 murder or be involved in another capital murder, just that
4 there's that probability of some type of violent criminal
5 act. Does that make sense to you?

6 A. Yes.

7 Q. Okay. Then finally the last word in that
8 question, "society." When you see that word, what does it
9 mean to you, or how would you define it?

10 A. Oh, goodness. Words don't come to me. The
11 people at large, the community.

12 Q. Okay. That's typically what people say, I
13 guess, everyone. Everyone and anyone that the person may
14 come into contact with? Does that make sense to you?

15 A. Yes.

16 Q. Okay. Even if they are behind bars? Other
17 inmates, prison guards, wardens, teachers, that type of
18 thing?

19 A. Yes.

20 Q. Okay. And, again, if you -- that question
21 starts off with a no answer and we have to prove to you that
22 it's a yes answer. If you answer No. 1 yes and you answer
23 No. 2, which we've already talked about, yes, then you move
24 to the third question, Special Issue No. 3. That question
25 is a little bit different in this sense. It doesn't start

1 off with that no answer. Neither side has the burden of
2 proof on that. We just leave it up to the jury to decide
3 whether they think, you know, what they think the answer
4 should be.

5 Basically, this question asks you to kind
6 of stop, look back at all the evidence you heard in the
7 first part of the trial, the second part of the trial. Look
8 back at the facts of the crime, the facts you've learned
9 about the defendant and his character and background, look
10 at what sort of personal moral blame he bears for the crime,
11 and ask yourself, is there anything mitigating? Is there
12 anything that lessens his personal moral blameworthiness?

13 And if there is, is it sufficient that
14 his life ought to be spared, that he should be given that
15 life sentence instead of a death sentence? Does that
16 question make sense to you?

17 A. Yes.

18 Q. Okay. You kind of -- does it make sense to
19 you why we have that question?

20 A. Yes.

21 Q. Okay. As you sit there right now, is there
22 anything that comes to mind that would be potentially
23 mitigating in these type of cases?

24 A. No, I can't come up with anything.

25 Q. Okay. That's the most common answer we hear.

1 Hopefully, you don't sit around thinking about what would be
2 mitigating in a death penalty case. But some people tell us
3 maybe a person's background, you know, if they had a bad
4 childhood, physical, mental, emotional abuse, some type of
5 -- something like that. Some people might consider that
6 potentially mitigating.

7 Other people are kind of the opposite end
8 of the spectrum. They say, you know, my heart goes out to
9 you, you had a bad childhood, but at some point you are old
10 enough to be responsible for your actions, and I just don't
11 consider that mitigating. I don't consider that an excuse.
12 Where do you kind of fall down on that issue?

13 A. I would be on the side where there comes a
14 point where you are responsible.

15 Q. Okay. We commonly hear that. The law doesn't
16 require that a juror tell us what they think would be
17 mitigating at this point, or be able to envision anything
18 mitigating. You don't even have to agree with the other
19 jurors, you know. You may think one thing is mitigating and
20 another juror may not.

21 All the law requires is that you're able
22 to keep an open mind and if you are hear something
23 potentially mitigating, your mind won't be closed, you could
24 listen to it, and give it whatever weight that you think is
25 appropriate, that type of thing. Is that something you

1 think you could do?

2 A. Yes.

3 Q. Okay. Any questions about kind of the scheme
4 we have, the sentencing scheme?

5 A. No.

6 Q. Okay. And, again, the only way we get to the
7 death penalty is a yes, yes, and no answer. If the
8 questions are answered any other way, that person is
9 sentenced to a life sentence. Just to let you know what a
10 life sentence means in Texas in this type of case, you may
11 wonder about parole. Every criminal offense in Texas is
12 parolable. There's no such thing as life without parole in
13 Texas.

14 In a capital case like this, a death
15 penalty case, if a person is sentenced to life, that person
16 must do forty years, day for day, before they would be
17 eligible for parole. Now, they may make parole that first
18 time up after forty years, or they may never make parole.
19 They may actually serve a legitimate life sentence.

20 We don't know that. It's something that
21 happens way in the future that no one here has control over.
22 So, we kind of ask a jury just to, just to assume life means
23 life when they think about it. Does that make sense to you?

24 A. Yes.

25 Q. Is that something you think you could do?

1 A. Yes.

2 Q. Okay. Some things that may be familiar to you
3 from your past jury service, the burden of proof is always
4 on this table. The defense doesn't have to bring you
5 anything. They can sit there and do crosswords, if they
6 wanted to. I don't think they will, they're fine lawyers,
7 but, nevertheless, you've always got to look to the State to
8 bring the evidence.

9 As you can imagine, we have alleged that
10 a police officer has been killed in the line of duty.
11 You're probably going to hear from people in law
12 enforcement, and I know you have extensive ties, I guess, to
13 people in law enforcement. What the law says with those
14 type of witnesses is that jurors have to start them out on
15 the same level of credibility.

16 You can't give someone, as a juror, an
17 automatic leg up just because they have a badge and a gun.
18 You know, once you start listening to them testify, and
19 they're credible, then you can give them the credit they
20 deserve. But you just can't automatically start them out a
21 little bit higher. Does that make sense to you?

22 A. Yes.

23 Q. Okay. Is that a law you think you could
24 follow?

25 A. Yes.

1 Q. Okay. Sometimes in these cases the defense or
2 maybe even the State or both sides may call a psychiatrist
3 or psychologist to try to give the jury some insight in one
4 of these, how to answer question No. 1 or question No. 3.
5 So, we're always curious to kind of get people's gut
6 reaction to those type of witnesses. I'm just curious what
7 comes to mind when you think about those type of witnesses
8 in a case like this.

9 A. Well, I said in this that I thought that they
10 would probably be biased one way or the other.

11 Q. Okay.

12 A. I think that's probably what I would think.

13 Q. Going into it with that view, do you still
14 think you could kind of keep an open mind and listen to
15 whoever you heard, go with them if they made sense, not go
16 with them if they didn't make sense, that type thing?

17 A. I would listen objectively.

18 Q. Okay. And that's all the law requires. Do
19 you have any questions of me, Ms. Evans? I know we have
20 gone through quite a bit. I want to make sure you really
21 understand how the sentencing scheme works. Any questions
22 at all about that?

23 A. Not that I can think of.

24 Q. Okay. Let me take a minute to look through
25 your questionnaire. Ms. Evans, thank you so much for your

1 time, I appreciate it.

2 MR. WIRSKYE: Judge, that's all I have.

3 THE COURT: Ms. Busbee?

4 CROSS-EXAMINATION

5 BY MS. BUSBEE:

6 Q. Thank you, Ms. Evans. I don't have to take so
7 long, because Mr. Wirskye explained everything to you. I
8 just want to talk to you, frankly, about what we're looking
9 for here in a juror. You saw, oh, gosh, how many people?
10 You were in the afternoon. We had that many people in the
11 morning. We've already gone through that list. And we've
12 got, what, nine or ten jurors, so we've still got jurors to
13 select.

14 We read these questionnaires and we get
15 an idea about people because, you know, they're designed to
16 test your gut reaction to things before we tell you how it
17 really works. And it doesn't seem fair, but it really kind
18 of gives us an idea of your attitude. And, you know, I see
19 -- I wrote on my questionnaire when I read it, husband FBI,
20 daughter FBI, and at the bottom I put, but she's very
21 reasonable.

22 And then, you know, we come in here and
23 we see you and sometimes our reactions to the questionnaires
24 are correct and most times they're not. That's why we ask
25 you down here to talk to you. But -- so you can understand

1 why we would be a little concerned that your -- you've got
2 people in your family that are in law enforcement. But I'm
3 not reading from you that you think you have a mandate to be
4 on the side of the State or the defense. Is that a fair
5 statement?

6 A. That's fair and I think that's true.

7 Q. Okay. Obviously, it's a horrible thing when a
8 police officer gets killed, and the reason we like to talk
9 to people about these issues is, obviously, you wouldn't be
10 here, if you weren't a reasonable, lawabiding person. But
11 someone has died and someone else may die as a result. And,
12 so, obviously, emotions are involved, and we just kind of
13 like to make sure that both sides get a fair hearing from
14 the jurors.

15 And that's why we ask you these questions
16 and you, like most people, kind of gulp when you think, you
17 know, think about you might actually have to do it. The
18 State has indicated to you that they're seeking the death
19 penalty in this case for someone who is not -- a nonshooter,
20 an accomplice. And we can't go into the facts of the case,
21 because that wouldn't be fair.

22 But I would like to hear your general
23 impressions of what would be important to you as far as, not
24 guilt or innocence, anybody who participates as a party to
25 an offense is guilty of that offense, so I'm not talking

1 about that aspect of it. I'm thinking more of what
2 participation of a party in your mind would be more worthy
3 of a death sentence? Am I asking that properly? I'm asking
4 you, because you said it, you know, it would really depend
5 on the circumstances.

6 A. Uh-huh.

7 Q. And I'm just wondering if you had any
8 circumstances in mind?

9 A. Well, if this person, you know, was totally in
10 on planning the robbery, and helped get all the setup and
11 participated in that, but did not have any connection with
12 the actual, you know, death of the officer, I would be
13 curious about, you know.

14 Q. Well, and that's kind of what a lot of people
15 say. I just wanted to kind of -- it's hard to get people up
16 on the witness stand, tell them what the scheme is, and then
17 ask them to spit back at you something you haven't had any
18 time to think about it. I think, you know, some of those
19 things, some of those issues, go into that third question,
20 the personal moral culpability and circumstances of the
21 offense.

22 So, I guess my question, you've really --
23 some of the questions I had to ask you, you answered for
24 Mr. Wirsky in such a way that I don't really need to go
25 over that with you. I did have a question about whether or

1 not you approved of this scheme. Do you think this is the
2 proper way to --

3 A. This scheme?

4 Q. Yes, ma'am.

5 A. Yes, I think it's fairly, it's logical.

6 Q. Okay. It is almost like a chemistry formula
7 in a sense, except that it calls for some subjective
8 conclusions.

9 A. Yes.

10 Q. You have to take step one in the process and
11 if you answer that no, of course, you don't go any further.
12 But if you -- if that step is accomplished, you go into
13 Special Issue No. 2, step 2 in the formula. And if that
14 answer is no, then there's no need to go on to the third
15 question. But, but they do go in that logical progression.
16 One, and if 1, then 2, and if 2, then the final question.
17 Even considering that you have answered Special Issue No. 1
18 yes and 2 yes, you would still be open to giving a life
19 sentence?

20 A. You're asking that to me?

21 Q. Yes, ma'am.

22 A. Yes, I would be open to that.

23 Q. Do you have any comments for us, either side,
24 about anything we haven't asked you about or concerns?

25 A. You would have to have all the jurors to agree

1 to, on this?

2 Q. The Judge will give you the instructions on
3 that.

4 A. I would just think that would be very
5 difficult to get agreement on something like this.

6 Q. Well, as they told you, well, you know, that's
7 the State's burden to prove things beyond a reasonable
8 doubt. And if it isn't proved beyond a reasonable doubt,
9 then the answer to Special Issue 1 and 2 would be no.

10 But as to Special Issue No. 3, as
11 Mr. Wirskye explained, you don't have to come to a consensus
12 as to why you don't think the death penalty should be
13 imposed, just that, for some reason, you personally don't
14 believe that it should be. Is that a fair statement?

15 A. I understand, yes.

16 Q. Okay. Well, you are much easier to educate
17 than a lot of people that come down here, so I'm not going
18 to take up any more of your time.

19 MS. BUSBEE: No more questions of this
20 juror, Your Honor.

21 THE COURT: Thank you, ma'am. If you
22 would be so kind as to wait for us out in the hallway.
23 We'll have you back in just a moment.

24 [Prospective juror out]

25 THE COURT: What says the State with

1 juror No. 2816, Ms. Grace A. Evans?

2 MR. WIRSKYE: State has no challenge for
3 cause.

4 MS. BUSBEE: Defense has no challenge for
5 cause.

6 THE COURT: Would you like to step in
7 your office?

8 MS. BUSBEE: Yes, please.

9 (Recess)

10 THE COURT: What says the State?

11 MR. WIRSKYE: State will exercise a
12 preemptory.

13 [Prospective juror in]

14 THE COURT: Ms. Evans, I want to thank
15 you for your time and very thoughtful attention to this
16 Court. I inform you that you shall not be a juror in this
17 case.

18 PROSPECTIVE JUROR: Thank you very much.

19 THE COURT: All right. You are free to
20 go.

21 [Prospective juror out]

22 THE COURT: Ms. Rowell.

23 [Prospective juror in]

24 THE COURT: Good morning. Please have a
25 seat. Juror No. 2899, Ms. Linda Sue Rowell?

1 PROSPECTIVE JUROR: Yes, like Powell,
2 only Rowell.

3 THE COURT: Rowell. Welcome to the
4 283rd.

5 PROSPECTIVE JUROR: Thank you.

6 THE COURT: I see you have had enough
7 time this morning to read the guide I provided for you?

8 PROSPECTIVE JUROR: Yes.

9 THE COURT: That's a lot of information
10 to give someone first thing in the morning. And I also
11 provided a copy of your questionnaire that you filled out
12 for us back in May --

13 PROSPECTIVE JUROR: Yes.

14 THE COURT: -- for you to refer to, to
15 begin to let you think about the issues both the attorneys
16 will discuss with you. I see you've got some caffeine this
17 morning, so looks like you're ready to go.

18 PROSPECTIVE JUROR: Ready, yes, sir.

19 THE COURT: This is our only opportunity
20 to visit with you about how this all relates and how this
21 type of trial will proceed. There are no wrong answers.
22 The objective here is for you to learn. And at the end of
23 the process I have two questions I must ask. Number one is
24 do you understand the law? And number two, can you follow
25 the law? That's the big picture I have to have. Only

1 question I have for you at this time is will you be able to
2 serve this Court for a period of two weeks beginning on
3 November 10th?

4 PROSPECTIVE JUROR: Yes.

5 THE COURT: Thank you very much. Mr.
6 Shook?

7 MR. SHOOK: May it please the Court?

8 LINDA ROWELL,
9 having been duly sworn, was examined and testified as
10 follows:

11 DIRECT EXAMINATION

12 BY MR. SHOOK:

13 Q. Ms. Rowell, my name is Toby Shook. I'm going
14 to ask you questions on behalf of the State. And as the
15 Judge has said, there's no right or wrong answers to any of
16 our questions. We just want your honest opinions. You've
17 been down on jury duty before, I think. This one is a
18 little different, because it's a capital murder case in
19 which the State is seeking the death penalty.

20 The procedure is we interview each juror
21 individually. We don't mean to make you feel like you're
22 the one on trial. Sometimes jurors feel that way because
23 they're on the witness stand. But we have found it's a
24 pretty good way of getting information and you can ask us
25 questions at any time, so don't hesitate to do that.

1 I'm going to follow up on some of your
2 answers in your questionnaire and then I'll talk to you
3 about capital murder, the death penalty, how you feel about
4 that, and some of the rules and laws that apply in these
5 types of cases. I see you are originally from Ponca City?

6 A. Yes, sir.

7 Q. And you've lived several places, but I believe
8 you said that most of your life you spent in Ponca City; is
9 that right?

10 A. Yes.

11 Q. Okay. And you've done a little bit, looked
12 like a little bit of everything. You were a teacher, Jr.
13 High?

14 A. Yes, sir.

15 Q. What subject did you teach there?

16 A. Jr. High.

17 Q. Okay. Just several subjects, or --

18 A. No, sir, I was the physical education teacher.

19 Q. Okay. And then you've been a counselor as
20 well as a travel agent?

21 A. Yes.

22 Q. And then now, you have one of the more
23 interesting jobs we came across, as a house mother?

24 A. Yes, sir.

25 Q. What brought you down to Dallas? Was that

1 that particular job or --

2 A. I was a house mother at the University of
3 Oklahoma. My niece had a baby and I have no children, so I
4 kept running down to Dallas to see the baby and I was
5 wearing out my tires, so I asked to come to SMU.

6 Q. Okay. And you've been there ever since?

7 A. Yes. Same house.

8 THE COURT: Which house?

9 PROSPECTIVE JUROR: Chi Omegas.

10 Q. (By Mr. Shook) The Judge went to SMU. He may
11 have snuck around the Chi Omega house.

12 A. If he's a man, he has.

13 MS. BUSBEE: Let the record reflect the
14 Judge is getting very red.

15 THE COURT: Yes, I did.

16 Q. (By Mr. Shook) Now, what are your duties
17 there as the house mother on the daily basis?

18 A. On a daily basis I oversee the household for
19 forty girls. I have two cooks. I have two housekeepers. I
20 oversee the guard and the maintenance, and I write their
21 bills, keep them out of debt, and I've got people over me
22 that I have to report to.

23 Q. With this much notice, if you were chosen to
24 be on the jury in November, I take it you'd be able to make
25 other arrangements or be able to -- it's an inconvenience,

1 obviously, to everyone, but you'd be able to handle that
2 inconvenience?

3 A. I mean, I wouldn't be sleeping here, would I?

4 Q No. No, the Judge lets everyone go home
5 around 4:30 or 5:00. The only time you might be sleeping
6 here -- it wouldn't be here, but at a hotel, would be if you
7 were sequestered during deliberations.

8 A. I see. I'm sure that the Chi Omegas would
9 allow that.

10 Q. Okay. All right. Let me talk to you -- well,
11 let me, as far as law enforcement goes, you had a niece
12 whose husband is a DEA agent?

13 A. Yes, sir.

14 Q. Is he still a DEA?

15 A. No, sir.

16 Q. All right. Did he ever relate his stories --

17 A. Oh, no.

18 Q. -- to you or anything like that?

19 A. I would like -- personally didn't want to know
20 about them, either.

21 Q. Okay. So that shouldn't cause you a problem

22 --

23 A. No.

24 Q. -- being biased in any way. Let me ask you
25 about how you feel about the death penalty as a law. Are

1 you -- you're in favor of it as a law?

2 A. Yes, sir.

3 Q. Can you tell us in your own words why you
4 favor it, maybe the purpose you feel it serves society?

5 A. I think that there are some people, that if
6 proven so, should definitely have the death penalty.

7 Q. Okay.

8 A. I just feel that way.

9 Q. Has it been -- have you believed in the death
10 penalty as a law since you've been an adult?

11 A. All my life I've felt that way.

12 Q. Is it just kind of --

13 A. We don't discuss it in my family. You know, I
14 may feel differently, if I had had a family member that was
15 involved in it. But I have no waivering points on that.

16 Q. Okay. What, when you think of an appropriate
17 case for the death penalty or the type of crime, from your
18 own personal point of view, what types of crimes do you
19 think?

20 A. Taking the life of another person is wrong as
21 far as I'm concerned.

22 Q. Okay. Have there been any --

23 A. It doesn't matter whether they've been on
24 drugs, either.

25 Q. All right. That's one of the questions we

1 ask. It's not a legal defense to be on drugs, especially if
2 it's --

3 A. No.

4 Q. -- voluntary.

5 A. Because in the first place, it's their choice
6 to be on them.

7 Q. All right. Have there been any cases that
8 you've followed in the media locally or nationally that you
9 thought were death penalty occasions?

10 A. O. J.

11 Q. O. J. Almost everyone followed the O. J.
12 case. What were your thoughts on that?

13 A. I'm not sure they proved it, but I think he
14 was guilty.

15 Q. Okay.

16 A. That's my thought.

17 Q. A lot of people tell us that.

18 A. Yeah.

19 Q. And, obviously, I think the prosecution did
20 have some problems or they did something wrong.

21 A. Uh-huh.

22 Q. And, of course, in California, I don't know
23 what goes on out there, but they seem to try cases a lot
24 different.

25 A. I think so. It's different than a lot of

1 states, California.

2 Q. Yeah. They take about eight months to try a
3 case and we don't have that problem here.

4 A. No, I'm glad.

5 Q. In this case it probably won't take more than
6 two weeks, as the Judge has said. If it were up to you, and
7 you talk about murder cases, which is the most common
8 answer, would you ever have the death penalty for some
9 crimes other than murder?

10 A. I would have to read the case.

11 Q. Okay.

12 A. I'd be openminded to it.

13 Q. All right. In Texas, right now, and you
14 probably know from looking at the packet the Judge gave you,
15 the death penalty is just reserved for certain types of
16 murder cases. We have some brutal killings which can get
17 life in prison, but they can't get the death penalty because
18 of the way the statute is set up.

19 One case that jurors often bring up is a
20 case that happened in Highland Park several years ago with
21 the accountant killed his wife in front of the children. I
22 think his name was Timothy Richardson. And that was a lot
23 of publicity. It was a brutal crime, but he couldn't
24 receive the death penalty for it.

25 The death penalty is reserved for

1 intentional murders on an unjustified homicide. Not in
2 self-defense, not an accident, but with some other
3 aggravated circumstances such as a murder that occurs during
4 the course of a felony.

5 For instance, if I go and I rob a
6 7-Eleven store and I shoot the clerk. That could be a death
7 penalty case. Murder during a burglary, someone breaks in
8 the home, that could be a death penalty case. Murder of --
9 during the commission of a rape, or a kidnapping, or an
10 arson, during those types of felonies.

11 Also, murder of a police officer or
12 fireman on duty can be a death penalty case, murder of a
13 child under the age of six, as well as murder of more than
14 one victim, a serial killer situation, or the mass murder.

15 A. Why do you say at the age of six and not all
16 children?

17 Q. I don't know why the legislature chose that
18 age. I think what it is, they had to choose one age and not
19 just say children. In other words, the courts said we've
20 got to have some guidelines. And for whatever reason they
21 chose age 6. I think a lot of jurors and a lot of citizens
22 would like to have that moved up.

23 A. Uh-huh.

24 Q. Obviously, what's the difference in a 6 year
25 old and a 7 year old? But in their infinite wisdom, for

1 some reason, they chose age 6.

2 A. Okay.

3 Q. But -- but I've never been given an
4 explanation on it. I know a lot of people would rather have
5 like 15 or under or something like that.

6 A. Uh-huh.

7 Q. And then the only other situation that I can
8 think of right now would be the, a murder for hire, if
9 someone does it for money, like your hitman situation. But
10 those are the -- what they set out right now. As far as
11 that list of types of crimes, do you agree that those are
12 the types of crimes that you think should at least be
13 considered for the death penalty?

14 A. Yes, sir.

15 Q. Okay. Now, another area I want to talk to you
16 about is what we call the law of parties, which is more
17 commonly known as accomplices, at least that's the word I'm
18 more familiar with. But they named it the law of parties in
19 Texas. If more than one person commits a crime, they can
20 all be held responsible.

21 And that's true in a capital murder
22 situation, even if some of the people involved didn't
23 actually cause the death. If you are all acting as a team,
24 acting together, participating in the event, the law says
25 that they can be found guilty, and in a capital murder

1 situation, an accomplice could, under certain facts, receive
2 the death penalty.

3 An example I often give is, let's say,
4 Mr. Wirskye and I decide we want, as a team we're going to
5 commit bank robbery. Our plan calls for me to go in there
6 with a loaded gun and I'm going to point it at the tellers.
7 I'm going to have them put their hands up. I'll threaten
8 them. And then while they're being held at bay, he'll go in
9 and unload the cash into a big sack, go through the drawers.

10 Now, during the course of that robbery, I
11 might shoot someone. Let's say I intentionally shoot one of
12 the clerks because I don't like the way they're looking at
13 me or he tells me one may be going for an alarm. I kill
14 him. We flee. But we're arrested.

15 Now, obviously, I can be prosecuted for
16 the death penalty because I murdered someone during the
17 course of a robbery, and I could get the death penalty,
18 depending on the jury. The law says, also, that he could be
19 held accountable and found guilty of capital murder, also,
20 and depending on the facts, he could ultimately get the
21 death penalty, even though he's not the triggerman.

22 And people feel differently about that as
23 far as the law goes. Some people are strongly in favor of
24 the death penalty for someone who actually causes the death,
25 the triggerman, or the murderer. But they would draw a line

1 from their own personal point of view as far as an
2 accomplice goes. They don't think that's quite fair that
3 someone gets the death penalty, if they didn't actually
4 cause the death, maybe a long term of years, but not the
5 death penalty.

6 Other jurors tell us, no, I feel an
7 accomplice should be held accountable and could receive the
8 death penalty, again, depending on the facts. But they do
9 think it's fair for the prosecution in a death penalty case
10 of an accomplice.

11 But everyone feels differently and we
12 just want to get your honest opinion on how you feel about
13 the prosecution of a death penalty case on an accomplice.

14 A. I think that if he went in as an accomplice
15 and it took place, you could be accountable, and I could
16 vote yes.

17 Q. Okay. Would it just depend on the facts of
18 the case?

19 A. Yes.

20 Q. What types of factors do you think would be
21 important to you in those situations?

22 A. Not having ever heard any facts and being in
23 the case, you would just have to prove it to me. And I
24 can't tell you.

25 Q. It's just -- but as far as a philosophical

1 point of view, you wouldn't take the death penalty off the
2 table. You'd feel it could be a fair punishment?

3 A. I do.

4 Q. Depending on those factors?

5 A. Yes.

6 Q. All right. Now, there's two theories of law
7 on that. One is the law would say that if someone is
8 actively participating, encouraging, aiding, directing in a
9 crime, they can be found guilty as an accomplice, as a
10 party.

11 The other theory is conspiracy.

12 Basically, it says if more than one person conspired to
13 commit one crime and while they are carrying that out, one
14 of the conspirators commits another to further the
15 conspiracy, they all could be held accountable, even if they
16 didn't have the intent to commit that other crime, if they
17 should have anticipated it could occur.

18 And in a capital murder situation, the
19 example I gave, conspiracy is simply me and Mr. Wirskye
20 agreeing to commit this bank robbery, and while we're
21 carrying it out, I commit the other felony of murdering one
22 of the clerks, he can be found guilty, if the jury believes
23 that he should have anticipated a death could occur, based
24 on those particular facts.

25 In that situation he doesn't even have to

1 have the intent that someone die. If the jury believes from
2 all the surrounding facts, well, he should have anticipated
3 something like that could occur in that situation, he could
4 be found guilty.

5 And, again, people feel differently about
6 that, that a person necessarily doesn't have to have the
7 intent if they -- if the facts show that he should have
8 anticipated that. How do you feel about that particular
9 area of the law?

10 A. Well, I think that someone has done a lot of
11 spin and if you decide to go down that road, then you should
12 suffer the consequences.

13 Q. Okay. Again, it's going to depend on each
14 case.

15 A. Yes.

16 Q. It's just going to depend on the facts of each
17 case.

18 A. Uh-huh.

19 Q. Now, are you familiar with the method of
20 execution in Texas?

21 A. No, sir.

22 Q. It's by lethal injection.

23 A. Okay.

24 Q. Which I believe is the same in Oklahoma, also.
25 Most states have that now.

1 A. I don't know that rule either.

2 Q. Okay. Hopefully, you don't want to spend a
3 lot of time --

4 A. No.

5 Q. -- learning about that stuff.

6 A. No.

7 Q. But the laws and the procedures are the same
8 in each case. In the punishment phase, the trial is divided
9 into two parts. You have the guilt/innocence stage. You
10 find someone guilty, you then move to the punishment phase.
11 At that point in time, you get these Special Issues, these
12 questions.

13 The State has to prove to you that the
14 defendant would be a continuing danger to society, that they
15 either intended the person to die or that they anticipated
16 that someone would die, and, finally, the jury decides if
17 there's sufficient mitigating evidence to call for a life
18 sentence or a death sentence.

19 But if the questions are answered yes,
20 yes, and no, the Judge wouldn't have any discretion. He
21 would sentence the defendant to death. If they are answered
22 any other way, again, he would have no discretion. He would
23 sentence the defendant to life. But those are the only two
24 possible choices, once you get to the punishment phase.
25 It's a death or life sentence and it all depends on how the

1 jury answers those questions.

2 A. Okay.

3 Q. The procedures are the same. They would be
4 the same in this case. If the defendant were found guilty
5 and the questions are answered yes, yes, and no, the Judge
6 would sentence him to death. He'd be placed on death row.

7 I couldn't tell you when, but at some
8 point in time the Judge would give an actual date of
9 execution. On that date or the day before, he'd be moved
10 from death row to downtown Huntsville, where oftentimes
11 there's news crews out there. You will see this on the news
12 of this prison unit, and the clock outside, protesters,
13 things of that nature, depending on what's going on, I
14 guess, in the news.

15 On the date of the executions, he's
16 always given a last meal. He's given time with family or
17 friends or a religious person of his choosing. But at 6:00
18 p.m. the execution takes place. There's a room there that's
19 often photographs appear on the news. It has a gurney with
20 leather straps. He's placed on that gurney. He's secured.
21 There's needles placed in his arm. There would be
22 witnesses, witnesses from the family's side that can go into
23 a room, witnesses from the defendant's side.

24 After they're there, the warden gives him
25 a chance to make a last statement, which is often reported.

1 He can claim his innocence, protest the death penalty, he
2 may ask for forgiveness. After that statement, the warden
3 simply signals the executioner, who injects chemicals which
4 will stop the heart, the lungs. He will lapse into a coma
5 and die within about 15 seconds. That happens like
6 clockwork in every execution.

7 We can't preview the facts, obviously,
8 and ask you for your verdict on what would happen, but we
9 can tell you that in this case it's our goal, we believe we
10 have the type and quality of evidence to convince a jury of
11 this man's guilt, that these questions will be answered in
12 such a way that he will be executed in the method I have
13 described.

14 We bring a lot of jurors down and
15 everyone has their own viewpoints. And it's one thing to
16 talk about the death penalty kind of in a philosophical
17 viewpoint, and another when you get down here and it's a
18 situation where you may be actually making these decisions.
19 Some people can do that and some people can't. It just
20 depends on the person.

21 You have told us, philosophically, you do
22 believe in the death penalty. You do believe it should be
23 carried out. I don't know if you know this, but Texas leads
24 the nation in executions, so it's a punishment that actually
25 is carried out.

1 Now that you've told us that you do
2 believe in it, are you the type of person who could actually
3 take pen in hand, if these questions are proven to you, you
4 could answer them in a way knowing that the defendant would
5 be executed someday?

6 A. Yes.

7 Q. Okay. Let's talk about these Special Issues
8 for a moment. You don't get to them, unless you've found
9 the defendant guilty. Then you may hear additional evidence
10 and then you'd get these questions. If you'd take a moment
11 just to read Special Issue No. 1 to yourself.

12 A. (Prospective juror complies.)

13 Q. It starts out with a no answer. And the State
14 must prove to you beyond a reasonable doubt it should be
15 answered yes. We do that by the evidence from the
16 guilt/innocence stage, which you look at again, and any
17 additional evidence you hear in the punishment phase. Just
18 looking at that question, you see how it's asking the jurors
19 to make a prediction about how the defendant would behave in
20 the future?

21 A. Yes.

22 Q. Do you feel comfortable in answering a
23 question like that, if you're given sufficient information?

24 A. Yes.

25 Q. What types of information would you personally

1 want to know about a person before you answer that question?

2 A. Background.

3 Q. Okay. That type of information is available
4 in that portion of the trial, if they've had a past history,
5 if they committed a crime before, if those witnesses can be
6 found and brought forth, you can even hear from them, the
7 type of sentence they received, and that sort of thing. You
8 can hear bad character evidence, you can hear good --

9 A. Situation.

10 Q. Okay. When you say situation, you mean with
11 the crime or their background?

12 A. Just, I'd have to know all the facts.

13 Q. Okay.

14 A. If I got them, the answer would be yes.

15 Q. All right. The -- it kind of is like a "This
16 Is Your Life." Remember that old show where they bring
17 someone out?

18 A. Uh-huh.

19 Q. You can hear from people that can say good
20 things or bad things about a person. So you can hear all
21 about their background. And then, again, you get to look at
22 the facts and their role in the crime and determine that.
23 Obviously, that will give you valuable information whether
24 they'd be dangerous.

25 The law is this, though, just because you

1 found someone guilty, that's not an automatic yes answer.
2 It might be yes or no, depending on the evidence in the
3 case. The jurors have to be able to tell the Judge that I
4 will wait and I'll listen and I'll gather all the evidence,
5 all the facts, and I'll look at anything new that's
6 introduced in the punishment phase from either side, and
7 then I'll look at that question and I'll require the State
8 to prove it to me beyond a reasonable doubt.

9 If they were automatic answers, just
10 because you found someone guilty, there wouldn't be any
11 reason to have the question. The law contemplates that some
12 of these capital murders are going to have death sentences,
13 some of them are going to have life sentences, just
14 depending on the facts of each case.

15 Do you feel you could follow that area of
16 the law and wait until all the evidence is in?

17 A. Yes, sir.

18 Q. And then you would make the decision?

19 A. Yes.

20 Q. It's kind of a common sense principle,
21 something you do every day in your job. You weigh all the
22 facts before you make a major decision. Same thing here.
23 Then you look at that question independently and you answer
24 it.

25 The second question has the same rules.

1 It starts out with a no answer and, again, the State must
2 prove to you beyond a reasonable doubt it should be answered
3 yes. And, again, you use the evidence you've heard in the
4 guilt/innocence stage and then any additional information
5 you've heard in the punishment phase in answering that
6 question. And this question No. 2 is that accomplice
7 situation, or covers that accomplice situation.

8 The first part of the question asks
9 whether the defendant actually caused the death of the
10 deceased. Now, if you believe from the facts he's the
11 actual triggerman or the murderer, then that part of
12 question is answered then.

13 But the second part of the question
14 covers that area of a nontriggerman. If he did not actually
15 cause the death of the deceased, but intended to kill the
16 deceased or another, or anticipated that a human life would
17 be taken. So that's the situation where you believe either
18 from the facts his intentions were someone would die, even
19 if he didn't cause it, or another person, or that he
20 anticipated that a life would be taken.

21 A little difference is, is to get someone
22 guilty the State must cross a hurdle where we prove he
23 should have anticipated. And here you look at the same
24 evidence and any new evidence and ask yourself, has the
25 State proven that he did anticipate?

1 We can't open a defendant's head up and
2 peer into him and determine his intent. All we can do is
3 produce all the surrounding facts, his role in the crime,
4 and juries use their common sense to determine someone's
5 intent from their actions.

6 Some people aren't comfortable doing
7 that. Most people, they do that in their everyday life and
8 are comfortable. But I just want to make sure you're
9 comfortable with making that type of decision on a person's
10 intent. You feel --

11 A. I am, and yes.

12 Q. Okay. You feel you could determine that from
13 a person's actions and all the surrounding facts?

14 A. Yes.

15 Q. Okay. You see the difference from what the
16 State has to prove in the guilt/innocence stage that he
17 should have anticipated, and here we have to go to the level
18 of he did anticipate. You see a difference there?

19 A. I see the difference.

20 Q. And you feel you could apply that?

21 A. Yes.

22 Q. Again, it might be the same exact evidence
23 you've used in the first part of the trial, but you just
24 have to look at it from the point of view of this question.
25 There's no automatic answers, again. You have to be able to

1 tell the Judge, I'm going to wait, I'm going to listen to
2 all the new evidence that comes in, then I'm going to answer
3 this question, based on everything I've heard. Do you feel
4 you could that?

5 A. Yes, sir.

6 Q. Okay. Now, this last question is slightly
7 different in that we don't have to prove to you beyond a
8 reasonable doubt it should be answered no. There's no
9 burden of proof for us or burden of proof on the defense.
10 It's the mitigation question.

11 Just take a moment to read it. It kind
12 of runs on, and I'll tell you now, though, that we didn't
13 write this question. Someone down at the Legislature did.
14 We get questions about it sometimes. It kind of covers
15 everything.

16 A. (Prospective juror complies.) Yes.

17 Q. You don't get to it unless you, until you've
18 found someone guilty, you determine that they're a
19 continuing danger, you determine that they intended or
20 anticipated someone would die. But it allows the jurors to
21 look at all the background, all the facts, and if they feel
22 sufficient mitigating evidence exists, they can assess a
23 life sentence rather than a death sentence.

24 Sometimes we call that a safety net or
25 safety valve. It allows jurors to show mercy. He doesn't

1 get off. He has to serve a life sentence. But it allows
2 them to do that, if they think that's the right thing to do,
3 based on the evidence and based on their heart.

4 Now, what mitigating evidence is, is up
5 to you and the other jurors. We can't tell you what it's
6 going to be. All you have to be able to do is tell the
7 Judge, I can keep my mind open to it. If I think something
8 is sufficiently mitigating, I'll answer the question yes.
9 And if don't, I'll answer it no. Do you feel you could keep
10 your mind open to that type of evidence?

11 A. Yes.

12 Q. Okay. Now, as you sit there today, again, I
13 just want to kind of get your gut reaction. Does anything
14 come to mind that you would view as potentially mitigating
15 evidence?

16 A. No, sir.

17 Q. Okay. That's 99 percent of our jurors tell us
18 that. Again, hopefully, folks don't sit around thinking of
19 these type issues.

20 A. No.

21 Q. Different things come up in different trials.
22 We can't preview these things to you, but oftentimes there
23 are talks about a person's background. You may hear about a
24 person's upbringing. Sometimes people come from broken
25 homes, sometimes poor environments, sometimes they've been

1 abused, physically or mentally.

2 Jurors feel differently about that type
3 of background. Some of them are very sympathetic, feel that
4 could be mitigating. Other jurors are sympathetic, but feel
5 that you have to take, you know, account of yourself, that
6 you can't use that as an excuse once you become an adult.
7 How do you feel about potentially that kind of background
8 information?

9 A. I personally feel that it's up to each
10 individual, and they cannot just say, I came from a bad
11 family.

12 Q. Okay. Most people feel that way. Sometimes
13 you hear about someone who is very young when they commit
14 the crime, and -- or very old. Jurors could view that
15 potentially as mitigating. We have other jurors who tell
16 us, if they're acting as an adult, then I think they should
17 be held responsible. Do you have any feelings about that?

18 A. My position is, if they're acting that way,
19 they should be accountable.

20 Q. Okay.

21 A. Twelve year olds are older than they were when
22 I was in high school.

23 Q. Okay. Now, the law is this now. The cut-off
24 age they've chosen is 17. You can be prosecuted and receive
25 the death penalty, if you are 17 years or above. You can

1 get a life sentence, if you are below that, but that's,
2 that's the age that they chose. Again, we can't tell you
3 what mitigating evidence is. You just have to be able to
4 keep your mind open to it.

5 You don't get to the question until you
6 have already found them guilty, they are a continuing
7 danger, and anticipated this life would be taken. But the
8 law contemplates there may be some facts which would allow
9 you to give a life sentence. What they are, you don't have
10 to tell us, just as long as you can keep your mind open to
11 it.

12 I had one juror describe it from his
13 point of view as, he viewed it as kind of a window closing.
14 If someone is found guilty, question 1, question 2, that
15 window got closed a little lower, but he still said his
16 window was open somewhat when he got to question 3. He
17 would look into it. That's the best way I've seen that you
18 can really describe it.

19 Again, I can't tell you what it is, but
20 you just have to be able to keep your mind open to it. Do
21 you feel you could do that?

22 A. Yes, sir.

23 Q. Okay. Now, oftentimes in the punishment
24 phase, you might hear from psychiatrists or psychologists
25 called by one side or the other. They may give you opinions

1 on a future danger or whether -- or their opinions on why
2 someone acts the way they do, mitigating evidence, that sort
3 of thing. Some jurors put a whole lot of stock in those
4 type of experts, think they walk on water.

5 Other jurors really don't even trust them
6 at all. They think you can look hard enough, pay them
7 enough money, you can find someone to give an opinion. And
8 other jurors tell us, I'd look at that. It wouldn't weigh
9 particularly one way or another with me, it would just be
10 another piece to the puzzle. Do you have any opinions about
11 those types of experts?

12 A. I think psychiatrists are important, but I
13 think -- I'm not frightened of their answers, and I would
14 listen to them.

15 Q. Okay.

16 A. But just because it's a psychiatrist, I
17 wouldn't make a decision.

18 Q. Be just another piece of the puzzle for you?

19 A. Correct.

20 Q. Okay. Let me kind of go over some rules that
21 apply to each criminal case, including a death penalty case.
22 You are going to be familiar with most of these, I think.
23 The presumption of innocence. Anyone charged with a crime
24 starts out with that presumption. The fact that you've been
25 arrested, charged, or we're going through this process, is

1 no evidence of guilt.

2 Each juror must start the defendant out
3 with that presumption and the State must prove to you beyond
4 a reasonable doubt that he's guilty. Could you follow that
5 rule?

6 A. Yes, sir.

7 Q. Now, we've got publicity in this case. Almost
8 everyone heard or read something about this case. That
9 doesn't make you ineligible to be a juror. If it did, then
10 we could never get a jury in a high publicity case. We ask
11 each juror what you recall from any details you may have
12 seen on TV or read in the newspaper. Do you remember
13 reading some about this?

14 A. I did not know until this morning what case it
15 was in that room.

16 Q. Okay.

17 A. And I remember hearing it on the television,
18 and I can remember where the young men were, up in Colorado,
19 only because I used to go to Chipita Park, Colorado, so I
20 knew the area.

21 Q. Okay.

22 A. Other than that --

23 Q. Okay. Just general details?

24 A. Yes, sir.

25 Q. All right. Again, that doesn't make you

1 ineligible to be a juror. We can't ask you to forget what
2 you've read, but what the law requires is the jurors would
3 only make their decision based on the witnesses in the
4 courtroom, and not something they've read or seen outside
5 the courtroom on TV or in the newspaper.

6 A. Uh-huh.

7 Q. Kind of, again, a common sense approach, the
8 better evidence is going to come from the actual witnesses.
9 Do you feel you could follow that rule of law and make your
10 decision just based on what you hear in the courtroom?

11 A. Yes, sir.

12 Q. Okay. The burden of proof is on the State of
13 Texas, as you know. And it never leaves this table. It
14 never shifts to the defense. They don't have a burden of
15 proving him innocent or that those questions should be
16 answered in such a way.

17 Common sense will tell you, most jurors
18 tell us, they anticipate the defense may put on evidence,
19 ask questions, try to prove his innocence. But you can't
20 require them to have that burden of proof. If you have a
21 reasonable doubt after we rest our case and they don't say a
22 word, you would have to find him not guilty, because that
23 burden of proof never leaves the State. Could you follow
24 that rule of law?

25 A. Yes, sir.

1 Q. Okay. The burden of proof goes to every part
2 of the indictment. We write the indictment, each and every
3 element of it. And we have to prove each and every element
4 to you beyond a reasonable doubt. If we fail on any, just
5 one element, you are obligated under the law to find the
6 defendant not guilty.

7 Let me give you a couple of examples. An
8 easy one is the identity. We, obviously, have to prove who
9 committed this crime. And at the end of the case, if you
10 had a reasonable doubt about that, you'd find the defendant
11 not guilty. It's pretty much a no-brainer.

12 However, another example is the county.
13 We also have to prove where this happened, Dallas County.
14 The law says that that element is just as important as the
15 identity. Maybe it's a case that happened near a
16 borderline. We didn't do our homework. The evidence shows
17 it looks like, in your mind, it happened in Tarrant County.

18 Now, we would've really fumbled the ball
19 on that kind of case. We would probably get fired, if we
20 screwed it up that bad. And I'm using it kind of as a way
21 out example. But if you had a reasonable doubt, even about
22 that element, the law says you would have to find him not
23 guilty, because you can't give us a hand. You can't help us
24 out.

25 Again, I just use that as an example to

1 demonstrate how that burden of proof goes to every element.
2 Do you feel you could follow that rule of law?

3 A. Yes, sir.

4 Q. Fifth Amendment, you've probably heard, you
5 know that if someone wants to testify, they can. No one can
6 stop them. But if they choose not to testify, the Judge
7 would instruct you that you can't hold that against them.
8 You can't use that as evidence.

9 There could be a lot of reasons why
10 someone may not want to testify. They may not be very well
11 educated. They may not do well in front of people. They
12 may look guilty when they're not. Their lawyer may be
13 advising them not to testify and they simply follow his
14 advice. And they may be very guilty and could look real
15 guilty, if they testify, and get hurt.

16 The law takes care of that by just
17 explaining to the jury you can't consider that. If they
18 choose not to testify, you'd have to make your decision just
19 based on all the evidence you've heard in the case. Could
20 you follow that rule?

21 A. Yes, sir.

22 Q. Police officers are involved in criminal
23 cases. Jurors usually respect the job they do, but you
24 can't start them out ahead of the other witnesses. You have
25 to wait until they testify and then judge their credibility

1 like you would any other witness. Do you feel you could do
2 that?

3 A. Yes, sir.

4 Q. Okay. Another issue that may or may not come
5 up is what we call lesser included offenses. Sometimes
6 jurors find defendants guilty of lesser included offenses.
7 And a lesser included offense of capital murder could be
8 robbery, aggravated robbery.

9 Aggravated robbery, penalty range carries
10 a life sentence all the way down to five years in prison and
11 anywhere in between. Again, the law is pretty simple as far
12 as punishment goes. A jury has to keep their -- a juror has
13 to keep their mind open to the full range of punishment,
14 wait until all the evidence is in about the person's
15 background, good and bad, and then determine what they think
16 the fair sentence is.

17 If you think a life sentence is fair
18 based on the evidence, you could do that. If you think as
19 little as five years in prison is fair, you could do that,
20 or anywhere in between. It's just going to depend on the
21 facts and the evidence of each case. Do you feel you could
22 keep your mind open to that full range of punishment?

23 A. Yes, sir.

24 Q. One last area is the parole laws. They come
25 -- they're covered in the news. People have strong opinions

1 on the parole laws. The Judge would instruct you in a
2 capital murder situation, that a capital life sentence means
3 that a person would serve forty calendar years before they
4 become eligible for the death penalty (sic). And then that
5 doesn't mean they'd be paroled.

6 The Judge would also instruct you that
7 the jurors cannot consider our parole laws in making any of
8 their determinations, because the parole laws are subject to
9 change, something that we don't control them. You just have
10 to consider a life sentence a life sentence. Do you feel
11 you could do that?

12 A. Yes, sir.

13 Q. Okay. Again, the bottom line is keeping your
14 mind open, waiting for all the evidence is in before you
15 determine guilt/innocence or before you determine any of
16 these questions. And you've indicated a few times, now,
17 that you feel you could do that.

18 A. Yes, sir.

19 Q. Okay. Do you have any questions over anything
20 we've covered? I've kind of run over a lot of ground here.

21 A. Not at this time.

22 Q. Okay. Well, I appreciate your honesty with me
23 and your patience.

24 MR. SHOOK: And that's all I have then,
25 Judge.

1 THE COURT: Mr. Sanchez?

2 MR. SANCHEZ: Thank you, Your Honor.

3 CROSS-EXAMINATION

4 BY MR. SANCHEZ:

5 Q. How are you doing this morning, Ms. Rowell?

6 A. Good.

7 Q. Are you tired of answering questions?

8 A. No, I do it all day long.

9 Q. Good. Good. That Pepsi is looking real good
10 up there right now, to me. Didn't have enough caffeine
11 today. I notice from your questionnaire that, we like to
12 look at what people do on their off-time, or their hobbies,
13 and I notice that you golf?

14 A. Yes, sir.

15 Q. You golf quite often?

16 A. Not at this time. I'm too busy.

17 Q. In the summer do you golf a lot?

18 A. Yes.

19 Q. Every day, or --

20 A. I used to do it every day.

21 Q. Oh, really? I'm always interested in that. I
22 just took up golf three years ago, and --

23 A. And I used to teach it down at Camp Waldomire
24 (phonetic).

25 Q. Oh, you did? I'm going to have to take some

1 lessons, then, because I need them. I can't break 100.
2 What -- as you know, I mean, you were called, what did you
3 think when you got the letter or phone call to come down
4 here and answer questions in front of us?

5 A. I wasn't surprised, and yet I thought possibly
6 you wouldn't call me, because I kept saying you have to
7 prove it to me.

8 Q. Okay. And you think the State may not want
9 you down here because you said that? Or do you think maybe
10 the prosecutors wouldn't want you down here because you kept
11 saying that?

12 A. Right.

13 Q. Well, I mean, you know, that could be a sign
14 that you are real fair. I mean, because the way the law
15 works is that it has to be proven to the jurors.

16 A. Uh-huh.

17 Q. We get some people that say, well, you know,
18 the allegation is enough for me, or based on what I heard on
19 the media is enough for me. And I would come into this
20 trial --

21 A. I don't particularly believe everything the
22 media says, thank you.

23 Q. And I'm glad you feel that way. But, I mean,
24 you know, we get some people in here that think that way.
25 And, you know, the posture of the law is that before

1 anybody's liberties or life can be taken away, the State or
2 the government has to prove that case beyond a reasonable
3 doubt. And only then can those liberties be affected. What
4 do you -- it sounds like you agree with that proposition?

5 A. I do agree with that.

6 Q. And, you know, we look at all the
7 questionnaires and we bring people in that actually have a
8 shot at making it on the jury. They haven't said something
9 in their questionnaire that automatically disqualifies them.
10 But we still get you in, because we want to probe some of
11 your answers and get your true feelings on things, you know.

12 The State, they explain the law to you
13 and they say, can you follow it? You know. And everybody
14 says yes. But then when we ask them their true feelings
15 about the law, some people say, well, you know, yeah, I can
16 follow it, but maybe not in that situation, or maybe I do
17 have a problem with it, the law, in a way that it might
18 affect being a fair juror. So that's why we're going to ask
19 you all these questions. Is that all right?

20 A. That's fine.

21 Q. Okay. What do you think about a life
22 sentence, generally? What do you think about somebody
23 receiving a life sentence in any case?

24 A. If it warrants the time, I agree.

25 Q. Okay. How about in a capital murder case?

1 How about in a case where someone's been convicted of
2 capital murder? Or, as in this case, the allegation is the
3 killing of a police officer. What do you think about a life
4 sentence in that situation?

5 A. Depends on the situation and what's been
6 proven. It would be an open situation for me and I would
7 weigh it.

8 Q. You think it could be appropriate?

9 A. Yes.

10 Q. Depending on the circumstances?

11 A. Depending.

12 Q. The reason I ask that is because some people
13 say, well, you know, I don't even think it would ever be
14 appropriate in this type thing.

15 A. It could be appropriate.

16 Q. What would be important to you, what would be
17 a factor in deciding whether it's appropriate or not? I
18 know it's a very openended question, but, you know, does
19 anything come to mind that would be appropriate?

20 A. No.

21 Q. Okay. But you could foresee --

22 A. It would depend on the situation and what you
23 are trying to prove.

24 Q. Okay. All right. Another thing I wanted to
25 talk to you about was I think the question about

1 conspiracies, about an accomplice who may not have the
2 intent that that occur, but once they were in the conspiracy
3 they could be held responsible, if they could foresee that a
4 death may happen. Do you remember that?

5 A. Yes.

6 Q. And you made a comment about once you went
7 down that road you must suffer the consequences. Could you
8 expand on that a little bit, what you meant by that?

9 A. Well, I just feel that the law at times has
10 provided a loophole for people to get off of a sentence and
11 I think that if we carried them out, that it would be more
12 likely to follow the rules.

13 Q. Okay. So, in your mind, if a person is
14 involved in a conspiracy, and if one of the parties had the
15 intent that someone die, then that would be enough for you
16 to prove?

17 A. Unless you proved it differently to me.

18 Q. Unless who proved it?

19 A. The defense.

20 Q. Okay. So, in your mind, if you found somebody
21 guilty of capital murder under the conspiracy theory, you
22 would require the defense to prove to you that that wasn't
23 their intent?

24 A. That's correct.

25 Q. So you would put the burden on us? Okay. You

1 know, we hear that a lot, you know. So you're not alone
2 with people saying that, even though the law would tell you
3 that we don't have to prove anything to you. Once you've
4 convicted somebody of capital murder, in your mind, you
5 would require us to prove to you that that wasn't their
6 intent or that they didn't anticipate that that would
7 happen. Would that be --

8 A. Wait. It could be that you could prove that
9 to me. Probably not. But you could. I've got to let you
10 work on it.

11 Q. Okay. But you would want us to do that?

12 A. Yes.

13 Q. Okay. And if we didn't do that to you, then
14 you would automatically find -- if we didn't prove that to
15 you, that the person didn't anticipate that someone's life
16 would be taken or that they didn't want that to happen, then
17 you would automatically say, well, then, you must have
18 intended that, if you haven't proved it otherwise? Would
19 that be fair in saying that?

20 A. I would have to, honestly, before I answered
21 that question you just gave me, because you went around
22 Robin Hood's barn. I would have to read it before I would
23 know exactly how to answer you.

24 Q. Well, just bottom line, you would require the
25 defense to prove to you --

1 A. Yes.

2 Q. That he didn't intend that a life --

3 A. Yes.

4 Q. -- would be taken? Okay. And nothing wrong
5 with saying that, okay?

6 A. Oh, I don't feel bad in saying that.

7 Q. Okay. But, of course, you understand that the
8 law or the law says that, you know, we have no burden to
9 prove anything to you?

10 A. I understand that, too.

11 Q. Okay. But you would still require that?

12 A. Yes.

13 Q. Okay. As far as media coverage is concerned,
14 I mean, you said you heard a little bit about it?

15 A. No. First I heard, well, on television last
16 year or whenever it was.

17 Q. Okay. And were you in Oklahoma when you heard
18 that?

19 A. No, I was here. I've been here for six years.

20 Q. Oh, okay. I'm sorry. What did you hear this
21 morning that, uh, or did you read something?

22 A. The gentleman that was in there, I said I
23 didn't know anything about this and he said he thought most
24 of them had been already tried.

25 Q. And who was that, one of the other jurors?

1 A. Yes.

2 Q. Okay.

3 A. And he just happened to mention Colorado, and
4 I said, oh, I remember.

5 Q. And what exactly did he explain to you about
6 that?

7 A. He didn't say anything other than that, what I
8 just said to you.

9 Q. Well, just based on what you have heard, have
10 you formed any opinions?

11 A. No, sir, I have not.

12 Q. Okay. Because you can understand that
13 somebody sitting on a jury, we don't want somebody over
14 there who has prejudged the case or already decided
15 something, that would have an open mind, that should have an
16 open mind as to what is proven or not proven in the case.

17 So that's why we ask that question.
18 Because there's people that say, well, you know, based on
19 what I've heard I've already formed the opinion that he's
20 guilty. But then they say, I can keep an open mind, but
21 I've already formed that opinion, you know. But somebody
22 like that probably wouldn't be fair, would you agree?

23 A. Yes, sir. I deal with that on a daily basis.

24 Q. Okay. Well, sometimes we don't phrase
25 questions the right way or sometimes we don't ask the right

1 question. But is there anything about this case, anything
2 about yourself, that you think might affect you being a fair
3 juror?

4 A. Would affect me what?

5 Q. Being a fair juror to both sides?

6 A. No, sir.

7 MR. SANCHEZ: That's all I have, Your
8 Honor.

9 THE COURT: Thank you, Ms. Prowell. If
10 you would wait for us outside in the hall, we'll have you
11 back in just a minute.

12 PROSPECTIVE JUROR: All right.

13 [Prospective juror out]

14 THE COURT: What says the State?

15 MR. SHOOK: Judge, we have no challenges
16 for cause. As far as this last issue goes, I believe when
17 we went over the law, she was quite clear that she would
18 require the State to prove this and not the defense. And I
19 think the confusion comes from the fact, the way the
20 question is phrased, she believes, well, if it's already
21 been proven by the State, would the defense have to prove
22 something, and that's what she's thinking.

23 And if it has been proven and we have
24 reached our burden of proof, then I think anyone with common
25 sense would, yeah, you're going to have to prove it to me

1 otherwise, then, if it's been proven by the State beyond a
2 reasonable doubt.

3 And I think that's where the confusion
4 is. I think when she was given the law, as the burden of
5 proof is here, she was very strong the State's got to prove
6 these things to me. That's her mindset. And I think she
7 may be confused from the defense questions in that they were
8 phrased, once it's been proven to you that this has
9 happened, then would the defense have to prove it? And
10 she's thinking that the State has proven all of this,
11 because, again, she may be confusing the guilt/innocence
12 with the punishment phase.

13 And I think that may be the confusion
14 there, because when I went over the differences on the
15 questions and the difference, and she had no problem seeing
16 the difference. But we didn't make that distinction with
17 the defense. And, after talking a while, the juror became
18 confused.

19 MS. BUSBEE: Well, actually, it's Mr.
20 Sanchez's juror.

21 MR. SANCHEZ: Your Honor, she didn't
22 really expand --

23 MS. BUSBEE: Well, there was not anybody
24 as confused as Mr. Shook, who has responded to a challenge
25 for cause that has not yet been made.

1 MR. SHOOK: Oh, well, then I could
2 challenge for cause, then.

3 MS. BUSBEE: Yeah, we're going to make a
4 challenge for cause.

5 THE COURT: He was anticipating
6 correctly. I, also, had the same direction that Mr. Shook
7 was implying that what I believed that she understood the
8 question to be. That's why I wanted to have her leave so we
9 could discuss this, so Mr. Sanchez, you can run at her
10 again.

11 Because it was the same tenor is what I
12 understood to the point that if the jury has answered
13 Special Issue No. 1 yes, and if the evidence by the State
14 has proven No. 2 to be yes, then maybe you're going to have
15 to show me something to show me no. That's the angle that I
16 believe she was answering from. I may be incorrect, that's
17 why I wanted her to leave.

18 MS. BUSBEE: The question was after you
19 found him guilty, not -- wasn't that your question?

20 MR. SHOOK: But you don't do that without
21 explaining the law to them first.

22 MS. BUSBEE: He did explain it to her,
23 and she said yes, I know, but I would require that.

24 MR. SHOOK: No, no. The way the question
25 is asked is after you get them saying that, then you go,

1 well, the law is this. You don't say there's two separate
2 parts and the State -- the law is not explained first and
3 then the question is asked.

4 MS. BUSBEE: It's our position, he said,
5 you know, that's not what the law is. The law doesn't
6 require us to prove anything and she said, yes, I know that,
7 but I would.

8 THE COURT: And I also heard that as
9 well. But I think she had some initial confusion on this
10 question. I'm on this side right now. I'm leaning toward a
11 challenge for cause, but also I want to focus the issue.
12 Either I'll let you ask it or I'll ask it. But it was -- I
13 had the same impression Mr. Shook had in that I believe that
14 was what she was understanding the question to be.

15 MS. BUSBEE: Okay. Well, we'll ask her.

16 MR. SHOOK: And we'd like an opportunity
17 to ask her, too.

18 THE COURT: That's why I have excused the
19 juror so we could have --

20 MS. BUSBEE: Let me talk to my co-counsel
21 a minute before we call her back in.

22 THE COURT: Ask Ms. Rowell to come back
23 in.

24 [Prospective juror in]

25 THE COURT: Thank you. You may be

1 seated. We have a few more questions for you. Mr. Sanchez?

2 MR. SANCHEZ: Thank you.

3 Q. (By Mr. Sanchez) Okay, Ms. Rowell. I just
4 want to explore, again, the area of the law that we were
5 talking about in which you've indicated that you would
6 require the defense to prove to you that the person didn't
7 anticipate or intend that someone die. Okay? Remember we
8 were talking about that a while ago?

9 A. Yes, sir.

10 Q. Okay. Once you found somebody guilty of
11 capital murder, okay? Of course, that's the only time we
12 get to these Special Issues. Does that make sense to you?

13 A. Yes, sir.

14 Q. In other words, before we even consider these
15 Special Issues, you have to find somebody guilty and if it's
16 in a conspiracy situation that you find them guilty, you've
17 already found that, that the answer to a conspiracy to
18 commit one offense, okay, and that a death occurred as part
19 of that conspiracy, okay?

20 A. Yes.

21 Q. Even though that person may have not had the
22 intent that somebody die, you found him guilty as a
23 co-conspirator. Does that make sense to you?

24 A. Yes.

25 Q. Okay. Now, after you get past Special Issue

1 No. 1, and you get to Special Issue No. 2, in which you
2 would have to believe that the person actually anticipated
3 that a human life would be taken when that crime was
4 committed, okay? See that in Special Issue No. 2?

5 A. Yes.

6 Q. Okay. What I heard from you was that once you
7 convicted them of capital murder and you found them guilty
8 as a party or as a co-conspirator, that in your mind you
9 would already have believed that that person actually
10 intended that a life would be taken or anticipated that a
11 life would be taken. Is that the way I heard it?

12 A. Repeat the question one more time.

13 Q. Okay.

14 A. I have a difficulty following you.

15 Q. Okay. If Special Issue No. 2 --

16 A. Yes.

17 Q. -- once you've convicted somebody of capital
18 murder, okay?

19 A. Is this this person over here and now we're
20 going to talk about a second person?

21 Q. No. We're talking about the person.

22 A. All right.

23 Q. And you found him guilty as either a
24 co-conspirator or as an accomplice.

25 A. Yes.

1 Q. Both ways that the State explained to you. In
2 Special Issue No. 2, in order to answer that question yes,
3 you're going to have to be convinced that the person
4 actually anticipated that a human life would be taken.

5 A. Yes.

6 Q. Okay. Now, you've told us before that once
7 you've convicted them of capital murder, that you would
8 automatically believe that that person anticipated that a
9 human life would be taken; is that correct?

10 A. Going down that road, yes.

11 Q. And you would require the defense to prove to
12 you that he actually didn't anticipate that a human life
13 could be taken?

14 A. I'm saying that you could prove it to me that
15 he didn't. I'm not saying you have to.

16 Q. Okay. But you would automatically already
17 believe that; is that correct?

18 A. Right. Yes.

19 Q. Just solely based on the fact that you found
20 him guilty of capital murder in the first part of the trial;
21 is that correct? In other words, when you are looking at
22 Special Issue No. 2, in your mind, that already would be
23 answered when you convicted him of capital murder?

24 A. But then you turn right around and say, it's
25 not up to you to prove it to me.

1 Q. No, it's not. It's not. But if you feel that
2 way, you can tell us.

3 A. I'm saying that you could prove it to me that
4 they didn't intend to. I'm looking at all the facts.

5 Q. But in your mind, would that already be
6 answered yes?

7 A. You mean when I first start? No, everyone is
8 innocent when you first start.

9 Q. Okay. I'm talking after you have convicted
10 somebody of capital murder and we're now -- we're in the
11 punishment stage.

12 A. Yes.

13 Q. Special Issue No. 2, in your mind, would that
14 already be answered yes because you found him guilty of
15 capital murder? You already -- would you in your mind
16 already think that they actually anticipated that a human
17 life would be taken before you even got to talk about
18 Special Issue No. 2?

19 A. I'm not sure. I don't know whether or not you
20 are trying to catch me up on something, because you're just
21 going around and around and around as far as I'm concerned.

22 THE COURT: Ms. Rowell, let me try to
23 come right down the middle of it. Lawyers do go round and
24 round.

25 PROSPECTIVE JUROR: Yes.

1 THE COURT: Okay. Let me ask you a
2 question and let me just get your thoughts. Do you
3 understand there is a difference in the level of proof
4 required to find someone guilty of capital murder and
5 ultimately going to the death issue on Special Issue No. 2?
6 You understand there's a higher level of proof required?

7 PROSPECTIVE JUROR: Yes.

8 THE COURT: Can you explain to me in your
9 own words that the difference is?

10 PROSPECTIVE JUROR: No, sir, I can't
11 explain to you, but it could be proven to me.

12 THE COURT: Let me give you the law, once
13 again.

14 PROSPECTIVE JUROR: Say it again?

15 THE COURT: I'm going to give you the
16 law, once again.

17 PROSPECTIVE JUROR: All right.

18 THE COURT: In order to find someone
19 guilty of capital murder as a party or as a conspiracy --
20 let's talk about conspiracy. You and I agree to commit a
21 felony.

22 PROSPECTIVE JUROR: Uh-huh.

23 THE COURT: We're going to go burglarize
24 the Chi Omega house because you've got the floor plan.

25 PROSPECTIVE JUROR: Okay.

1 THE COURT: We agree to that. We're
2 going to commit a felony. During the commission of the
3 felony, someone ends up getting killed.

4 PROSPECTIVE JUROR: Yes.

5 THE COURT: I pulled the trigger. You
6 are there with me. You are burglarizing with me. We had a
7 conspiracy to do that. At that point you could be found
8 guilty of capital murder, death during the commission of
9 another felony. Does that make sense?

10 PROSPECTIVE JUROR: Yes.

11 THE COURT: Now the issue becomes, you
12 knew I had a gun going in on a burglary. You should have
13 anticipated a death might occur. What's the difference
14 between that and Special Issue No. 2?

15 PROSPECTIVE JUROR: I don't think there's
16 really too much difference in either one of them.

17 THE COURT: Too much difference? There
18 is a difference. Should have anticipated. Look at the last
19 line. Now, you're the defendant. Did you actually cause
20 the death of the deceased, or did not actually cause the
21 death of the deceased, but intended to kill the deceased, or
22 another, or anticipated that a human life would be taken.
23 Do you see there's a difference in the level of proof
24 required?

25 PROSPECTIVE JUROR: I think when you and

1 I discussed it and you've got a gun in your hand, I should
2 realize that a death could occur. And I --

3 THE COURT: Could occur?

4 PROSPECTIVE JUROR: Could occur, if he
5 had a gun. And if I chose to go with you, I'm responsible.

6 THE COURT: No question. That's for
7 guilt.

8 PROSPECTIVE JUROR: Uh-huh.

9 THE COURT: A death could occur. He
10 should have anticipated a death could occur.

11 PROSPECTIVE JUROR: Right.

12 THE COURT: That question is asking, the
13 State has to prove that I anticipated or you anticipated,
14 not -- in his example of the car --

15 PROSPECTIVE JUROR: Well, sir, as far as
16 I'm concerned, I would anticipate if I'm -- if you've got a
17 gun, I would anticipate that something could happen. And if
18 I chose to go with you, I'm just as guilty as you are,
19 whether I have the gun in my hand.

20 THE COURT: You don't really see any
21 mental distinction between should have anticipated and did
22 anticipate?

23 PROSPECTIVE JUROR: Not really.

24 MR. SHOOK: Judge, we object. On those
25 particular facts, they can be the same thing.

1 THE COURT: I understand they can be.

2 MR. SHOOK: And her answer is yes, if I
3 know you have a gun, then that is the same thing. And under
4 the law, the juror can see it that way, because those are
5 specific facts.

6 THE COURT: Can you think of a difference
7 between should have anticipated and anticipated a human life
8 would be taken?

9 PROSPECTIVE JUROR: Should have
10 anticipated and --

11 THE COURT: And did anticipate that a
12 human life would be taken. There's a difference there. Do
13 you understand the difference? I gave you an example trying
14 to bring it down. We try to stay away from examples,
15 because you draw the wrong conclusions.

16 PROSPECTIVE JUROR: Yes, uh-huh.

17 THE COURT: There is a difference. Do
18 you understand it?

19 PROSPECTIVE JUROR: I understand. My
20 logic is you should have and maybe they did not anticipate
21 it.

22 THE COURT: There could be a fact pattern
23 that could result in --

24 PROSPECTIVE JUROR: Yes.

25 THE COURT: Who has to prove to you that

1 an individual did anticipate that a human life would be
2 taken in this case?

3 PROSPECTIVE JUROR: The prosecutor.

4 THE COURT: Mr. Sanchez?

5 Q. (By Mr. Sanchez) Bottom line, Ms. Rowell, now
6 that you know or that you've been explained the law, do you
7 feel before you could answer no to Special Issue No. 2, that
8 the defense would have to counter with some evidence before
9 you could answer that no?

10 A. You would have to, you could bring up issues
11 that would make me think through the situation.

12 Q. Would you have to have evidence from us in
13 order to answer that question no, honestly, just honestly?

14 A. Yes.

15 MR. SANCHEZ: That's all I have, Your
16 Honor.

17 THE COURT: Thank you. Mr. Shook, would
18 you like to redirect?

19 REDIRECT EXAMINATION

20 BY MR. SHOOK:

21 Q. You would always keep the burden of proof on
22 the State of Texas, would you not?

23 A. Yes.

24 Q. If it has been proven to you beyond a
25 reasonable doubt, though, you could keep your mind open to

1 facts and arguments and could answer the question either
2 way, depending on the evidence?

3 A. That's correct.

4 MR. SHOOK: That's all we have.

5 RE CROSS EXAMINATION

6 BY MR. SANCHEZ:

7 Q. You understand when you say that you would
8 want us to put on some evidence that somehow you're shifting
9 the burden to us. Do you understand that?

10 A. I understand that, but I don't think that -- I
11 think a defense lawyer has a reason for being there.

12 Q. And that's what you would want us to do, is
13 counter with some evidence?

14 A. Well, what I'm trying to say to you is that
15 you could bring up something that would make me think
16 differently. I can't tell you what it would be, but I'm
17 going to listen to both sides and you want me to say, well,
18 I don't want to be in charge of proof.

19 Q. No, no, but in order for you to answer that
20 question no, you would want something from the defense; is
21 that correct? I mean, just honestly, I mean, if that's your
22 -- honestly how you feel, would you -- would you want some
23 evidence --

24 A. My answer to that question is yes, too. You
25 could bring up something that would make me think no.

1 Q. And if I didn't, it would stay as yes?

2 A. Yes. He doesn't want to prove it (inaudible).

3 Q. I'm sorry, I didn't hear that.

4 A. Nothing.

5 Q. That's all I have.

6 THE COURT: Thank you, Ms. Rowell, wait
7 outside for us one more time.

8 [Prospective juror out]

9 THE COURT: Same positions?

10 MS. BUSBEE: Yes, sir, Your Honor.

11 MR. SHOOK: Yes, Judge. I think from her
12 additional answers, it's obvious, I mean, if you give her
13 facts, she says yes, that could be. But the bottom line for
14 her is she'll follow the law, require the State to prove,
15 and -- but she'll keep her mind open to it. And then they
16 use leading questions such as, well, you'd require the
17 defense. She's thinking I can listen to evidence, sure.

18 And the bottom line with her is when the
19 law is explained, she'll follow the law. But she's also
20 told us time and time again she's going to keep her mind
21 open to it, which means she's qualified.

22 THE COURT: Well, see, at the end of the
23 program, I've got a lady that's confused.

24 MR. SHOOK: I don't think she's confused,
25 once the law is explained to her.

1 THE COURT: And I jumped in the middle of
2 it and tried to bring it down on her level and give an
3 example that she doesn't really understand, is too specific,
4 and I make it worse.

5 MR. SHOOK: Well, I don't think you made
6 it worse, Judge. It's the example is what most people would
7 think. If you guys plan a big crime and you've got loaded
8 guns going in there, that "should have" and "did" could mean
9 the same thing, the same evidence, because basically that's
10 how it works. It's the same exact evidence. It's just
11 going to depend on the particular facts.

12 But when explained who has the burden of
13 proof, time and time again, the State does, and she's not
14 going to require them. But when they start asking would you
15 want us to, which sometimes they ask, and then you would
16 require that, that can confuse any juror, no matter what
17 their education level. But this woman's personality, she
18 makes her decisions based on all the facts, and she follows
19 the law.

20 THE COURT: I don't want to. She, at the
21 end of the day, was very frustrated, made a comment under
22 her breath. I didn't hear what it was. It was derogatory
23 to the defense. And I'm simply not going to qualify someone
24 who is confused to such a level that she's frustrated. I'm
25 not going to qualify this juror. Ask Ms. Rowell to come

1 back in, please.

2 [Prospective juror in]

3 THE COURT: Ms. Rowell, I want to thank
4 you for your time and attention to the Court today. I'm
5 going to inform you that you shall not be placed on this
6 jury.

7 PROSPECTIVE JUROR: Say that again, sir?

8 THE COURT: You didn't make the jury.

9 PROSPECTIVE JUROR: Okay. Thank you.

10 [Prospective juror out]

11 THE COURT: Mr. Pool.

12 [Prospective juror in]

13 THE COURT: Good morning, sir. How are
14 you?

15 PROSPECTIVE JUROR: Good, how are you?

16 THE COURT: Please have a seat. We have
17 juror No. 2975, Mr. Mark Christopher Pool. Mr. Pool, sorry
18 for the delay in getting you in this morning. We don't know
19 exactly how long we're going to speak with folks. We have
20 to balance 15 people against one, and your letter clued you
21 in it was for half a day, so I apologize for the delay.

22 PROSPECTIVE JUROR: Okay.

23 THE COURT: You are now the focus of our
24 attention. I know that you are somewhat nervous when you
25 come in. Please don't worry too much about this process.

1 This is the only opportunity that the attorneys have to
2 speak with you to talk about these issues.

3 The Court has given you a guide. I know
4 you've probably read it a couple of times, so you can begin
5 to think about these issues. I also provided a copy of your
6 questionnaire so you can review some of your answers. They
7 may want to have you expound upon them.

8 At the end of the day I have a question I
9 must answer. One is do you understand the law? And number
10 two, can you follow the law? That's the big picture I have.
11 The only question I have for you at this time is will you be
12 able to serve this Court for a period of two weeks beginning
13 on November 10th?

14 PROSPECTIVE JUROR: Yes.

15 THE COURT: Thank you, sir. Mr. Wirsbye?

16 MR. WIRSKYE: May it please the Court?

17 MARK POOL,

18 having been duly sworn, was examined and testified as
19 follows:

20 DIRECT EXAMINATION

21 BY MR. WIRSKYE:

22 Q. Mr. Pool, how are you this morning?

23 A. Good.

24 Q. Thanks for bearing with us again. My name is
25 Bill Wirsbye. I'll be the Assistant DA that will be

1 speaking with you for the next few minutes. To the extent
2 possible, try to relax. I know it's a little weird being up
3 there on the witness stand, and if you're over about six
4 foot, it's really uncomfortable to get in and out of there,
5 I know, so.

6 What I'd like to do is follow up with
7 some of the information in your questionnaire, which is -- I
8 know this questionnaire's -- in a sense it's a little
9 unfair, because we ask you how you feel about things and we
10 kind of lock you down on paper and then we bring you down
11 here and tell you what the law is and try to get you to
12 disqualify yourself.

13 The bottom line question as we go through
14 this, whatever your personal thoughts and feelings are, to
15 the extent that they may conflict with the law, as long as
16 you can set them aside, tell us you can follow the law, be
17 fair to both sides, you'd be a qualified juror.

18 I'll talk to you a little bit about your
19 thoughts and feelings on the death penalty, and then,
20 finally, talk about some of the laws and rules that apply in
21 the death penalty case. Do you have any questions before we
22 get started?

23 A. No, sir.

24 Q. Okay. You are a manager of B. C. Sports
25 Collectibles; is that right?

1 A. Yes, sir.

2 Q. Okay. Tell -- I think I know what kind of
3 business that is, but tell us.

4 A. It's autographed memorabilia and cards. It's
5 a retail store, also. We do clothing and just other
6 collectible things, also.

7 Q. Okay. What's a normal day like for you, if
8 there is a normal day for you?

9 A. It varies, but, you know, most of the time we
10 spend our day just taking care of customers and making sure
11 we get, you know, finding autograph memorabilia they might
12 want, or, you know, going through different resources to try
13 to get the things that they need, but mostly just retail
14 management, basically.

15 Q. Okay. In your free time, I know you've got, I
16 guess, a now two year old, but --

17 A. Yes.

18 Q. -- which takes a lot of time?

19 A. That's about it.

20 Q. Okay. I've got my first one on the way, so I
21 can only imagine how my life is going to change in a few
22 months. Let me ask you this. You told us that you
23 generally believe in the death penalty?

24 A. Yes.

25 Q. Could you tell us why you believe that?

1 A. I guess it's just my belief that if somebody
2 is convicted for murder, you know, just taking somebody
3 else's life, I just, I think you should be held accountable
4 for that and I think the death penalty is the best way to be
5 held accountable for that.

6 Q. Okay. And that's something, a belief you've
7 held most of your, I guess, at least your adult life, that
8 type thing?

9 A. Yes, sir.

10 Q. Looks like from your questionnaire you may
11 have some brother-in-laws that might disagree with that,
12 maybe?

13 A. Yes, sir.

14 Q. Tell us about that.

15 A. They're just maybe a little more, I guess
16 maybe just their upbringing maybe, maybe where they went to
17 school, maybe just their viewpoints on -- they're a little
18 more lenient, I guess, as far as on things like that, you
19 know, maybe just a little more, not quite as conservative as
20 I am on things like that. They're a little more liberal.

21 Q. You know, we kind of ask you to rank yourself
22 on how strongly you favor the death penalty in certain
23 cases, and you gave yourself a 10 out of 10, which I know is
24 the highest. But it means different things to different
25 people. But at the same time you also told us -- I mean,

1 you could keep that open mind and envision a capital murder
2 case where you may feel a life sentence is appropriate; is
3 that right?

4 A. Uh-huh, yes, sir.

5 Q. Let me talk to you a little bit about what we
6 call accomplices. Oftentimes crimes are committed by more
7 than one person. You may have a situation, a capital
8 murder, where you may just have one person, I guess, for
9 lack of a better term, as a triggerman, the person that
10 actually causes the death. You may have another group of
11 individuals who, although they were actively involved in the
12 crime, they didn't actually pull the trigger. They're
13 nontriggermen.

14 What the law in Texas is, depending on
15 the facts and circumstances, not only can a triggerman be
16 convicted of capital murder and potentially face the death
17 penalty, but again, depending on those facts and
18 circumstances, the nontriggermen accomplices can also be
19 convicted of capital murder and potentially face the death
20 penalty.

21 Some people disagree with that. They
22 would draw a line and only reserve the death penalty for
23 just the persons that actually pulled the trigger. For
24 whatever reason, religious, moral, or ethical, I guess they
25 believe the death penalty is only justified for the person

1 that actually took the life.

2 And some people feel differently and
3 could keep an open mind and based on the facts and
4 circumstances, consider a death sentence for an accomplice.
5 I'm just curious kind of where you fall down on that issue?

6 A. I think if there was a plan involved and they
7 had, you know, if there was a collective agreement that they
8 were going to commit the murder, you know, maybe if it was
9 just one person, but collectively they all decided that's
10 what needed to happen for them to, you know, do whatever
11 they were doing, I can see sentencing somebody to death for
12 that, too.

13 Q. Okay. And that's pretty much what the law is.
14 Just to give you a quick example to illustrate how the law
15 works with respect to accomplices, let's say Mr. Shook and
16 I, the other prosecutor, decide we're going to rob a bank.
17 The plan is for him to take a gun in to hold up the tellers.
18 While he's doing that, I'm going to go in with a bag and
19 collect the money from everybody.

20 During the course of this crime, for
21 whatever reason, maybe one of them kind of looks at him
22 funny or we see one of them going for a silent alarm, he
23 shoots and kills one of the tellers. He's committed a
24 capital murder. You got a chance to read the packet of law.
25 That would be a murder in the course of a robbery, which is

1 one of those cases that we reserve the death penalty for in
2 Texas.

3 He could be convicted of that and
4 potentially face the death penalty, depending on how the
5 jury answers these three questions that you read. The law
6 also says that I could, depending on the facts and
7 circumstances. Does that make sense to you?

8 A. Uh-huh, yes, sir.

9 Q. Okay. You could see how that would work?

10 A. Yes, sir.

11 Q. Okay. There are basically two different legal
12 theories for me to face the death penalty, the accomplice.
13 One is if I actively encouraged him, directed him, to commit
14 that capital murder. You know, if I turned to him and said,
15 Toby, one of them is going for that silent alarm, shoot and
16 kill her. Obviously, I directed him to commit the crime.
17 I'm just as guilty as he is, could potentially face the
18 death penalty.

19 The other aspect of the law is what we
20 kind of call the law of conspiracy. And that simply means
21 that Mr. Shook and I conspired or agreed to commit bank
22 robbery. During the course of that crime, somebody got
23 killed, okay? The law says that the accomplice should have
24 anticipated that that death could have occurred. Then I
25 could be found guilty of capital murder. Does that make

1 sense to you?

2 A. Yes, sir.

3 Q. And a lot of people feel, you know, hey, I
4 knew what I was signing up for. I knew I was going in with
5 a guy with a loaded gun. I should have anticipated that
6 that death could have occurred. Does that make sense to
7 you?

8 A. Yes, sir.

9 Q. And under those facts, of course, the jury, if
10 they thought I should have anticipated, could convict me of
11 capital murder, then we kind of move into the sentencing
12 portion of the trial.

13 But those are the two different ways that
14 accomplices could be found guilty of capital murder. It
15 sounds like that's a law you agree with?

16 A. Yes, sir.

17 Q. Okay. Let me talk to you a little bit about
18 publicity surrounding this case. Like everybody, just
19 about, that we talked to, you've indicated that you know at
20 least something about the facts of the case. That doesn't
21 disqualify you in any way from being a juror.

22 What the law says is even if jurors have
23 heard something about a case, even if it's detailed, or even
24 if the jurors maybe formed some opinions or formed some
25 impressions, as long as they can tell us that they will base

1 their verdict in this case just on the evidence that they
2 hear in the courtroom, they'd still be a qualified juror.
3 You know, we can't ask a juror to forget what they've
4 already heard, obviously. We just kind of ask you to put it
5 in the back of your mind.

6 And, you know, I don't know if you're
7 like me, but sometimes I'm a little skeptical about what I
8 hear in the media sometimes. They don't always get it
9 right. And I think the law recognizes that and we just ask
10 jurors to be able to tell us that they could base their
11 verdict just on what they hear in the courtroom, since that
12 is the best source of information. Is that something you
13 feel like you could do?

14 A. Yes, sir.

15 Q. Okay. What have you heard about this case?

16 A. From what I remember -- from what I remember,
17 I thought that he was part of the Texas Seven that escaped.
18 And I can't remember, I think it was at an Oshman's maybe,
19 that they ended up killing a police officer. And then I
20 think they caught the rest of them in Colorado, is basically
21 what I remember. I think one of them killed themselves
22 there, or something.

23 Q. Have you kept up with any of the results of
24 the other trials?

25 A. No, sir.

1 Q. Okay. Sounds like you just kind of have a
2 broad view or broad strokes of maybe what the facts are; is
3 that right?

4 A. Yes, sir.

5 Q. Do you think you could kind of push that to
6 the back of your mind and just base your verdict on what you
7 hear in the courtroom?

8 A. Yes, sir.

9 Q. Okay. Did you get a chance to meet the juror
10 that we just talked to?

11 A. Yes.

12 Q. Ms. Evans? Okay. Did y'all discuss this case
13 at all? She said y'all may have just briefly talked about
14 it.

15 A. Um, I think we basically just talked about him
16 being one of the Texas Seven, I think, was about all we
17 talked about.

18 Q. Nothing past that?

19 A. No, sir. I think maybe where -- I think she
20 was saying she thought she knew the place in Colorado where
21 they captured them. But I think that's where we ended it.

22 Q. Okay. She didn't give you any sort of extra
23 information or secret information that's going to cause you
24 to be unfair in this trial or anything like that?

25 A. No, sir.

1 Q. Okay. Fair enough. Let me explain to you a
2 little bit, kind of give you the broad view of the
3 procedures. All trials in Texas are broken down into two
4 different parts. The first phase of the trial is what we
5 call the guilt/innocence phase. And that's where the jury
6 decides whether we've proven what's in our indictment,
7 basically, is the person guilty of the crime they're charged
8 with?

9 And I think you got a chance to look at
10 our indictment. Basically, did we meet our burden of proof?
11 Did we prove it to you as a juror beyond a reasonable doubt
12 that he's guilty? And if we do that, then we move into the
13 second phase of the trial.

14 In that second phase of the trial you get
15 to hear extra, additional information. The rules of
16 evidence are more -- are broader, more expansive. You get
17 to hear character evidence, reputation evidence, criminal
18 history, if it exists, good and bad things one way or
19 another. And we give you a chance to hear this extra
20 information, because at the end of the second phase we ask a
21 jury to answer these three questions.

22 The only two possible punishments for
23 capital murder in Texas are a life sentence or a death
24 sentence. And we don't ask a jury to kind of choose between
25 those and write in a life sentence or write in a death

1 sentence. We ask a jury to work through these questions,
2 based on all the evidence they've heard in both phases of
3 the trial. And we let the answers to these questions kind
4 of determine the appropriate sentence. Does that make sense
5 to you?

6 A. Yes, sir.

7 Q. And what the law basically envisions in that
8 second phase is, even though you may have found him guilty
9 of capital murder, the law contemplates that we have jurors
10 who are able to start that second phase with an open mind to
11 the answers to these three questions.

12 We don't want jurors who say, you know,
13 just because I found him guilty of capital murder, I'm going
14 to answer that first question in a certain way or the second
15 question in a certain way or the third question. We want
16 jurors who will kind of wait, hold off on their decisions
17 until they've heard all the evidence, in order to be fair to
18 both sides, very frankly. Does that make sense to you?

19 A. Yes, sir.

20 Q. And that's the kind of mental discipline we
21 ask a juror to apply in this case. And to a certain extent,
22 it may be a little unnatural, but that's -- I think most
23 people understand those are the rules and I think most
24 people can follow them, if they are explained to them.

25 But we let the answers to those questions

1 determine the appropriate sentence. And, very briefly --
2 we'll go over them more in a second, but the first question
3 asks whether the person is a future danger to society. If
4 the answer to that is yes, we move to the second question,
5 which deals basically kind of with that accomplice scenario
6 that we've already talked about.

7 We basically ask you at that point
8 whether the person actually anticipated that a human life
9 would be taken, a little bit higher standard from the should
10 have anticipated. And we'll visit a little bit more about
11 that in a second.

12 Then, finally, the last step in the
13 process, the last question, is the mitigation question.
14 Basically, this is our chance, or your chance as a juror, to
15 show mercy based on the facts of the crime and the facts of
16 the background of the person, to see whether a life sentence
17 is warranted rather than a death sentence.

18 And if those questions are answered yes,
19 yes, and no, then the Judge has no discretion. The person
20 will be sentenced to death. Does that make sense to you?

21 A. Yes, sir.

22 Q. Okay. Now, you've told us you're generally in
23 favor of the death penalty. But I want to make sure, you
24 know, a lot of times we talk to people who are
25 philosophically are in favor of the death penalty in the

1 abstract. And to a lot of people when they get down here,
2 it becomes a little more real to them. They're actually
3 sitting here and they're looking at a person. They know
4 there's a chance that they'll be involved in the process in
5 the trial.

6 And some people, very frankly, tell us,
7 you know, I may be in favor of the death penalty, but I
8 don't really feel like I'm the type of person. I don't feel
9 like I'm cut out for this process. I'm in favor of it
10 philosophically, but I'm not sure I'm the type person that
11 could take pen in hand and answer these questions in such a
12 way that it may result in the death of another human being.

13 And, very frankly, that's our goal in
14 this case. We feel we have the quality and the quantity of
15 evidence that's going to convince a jury that he's guilty of
16 capital murder and convince a jury that those questions
17 should be answered in such a way that one day he will
18 ultimately be executed in Huntsville, Texas.

19 So, before we go any further, I want to
20 ask you, do you feel that you're the type person who could
21 take pen in hand and answer those questions, based on the
22 evidence that you've heard, in such a way that would result
23 in the execution of another human being?

24 A. Yes.

25 Q. Okay. Why do you feel that way?

1 A. If it, I guess it more or less depends on how
2 the murder occurred. If it was any kind of premeditated or,
3 I guess -- I guess that's more or less my overall view, is
4 if it's something somebody else didn't ask for, if it's
5 premeditated, it's just -- it's just, you know, no concern
6 for human life, something, you know, like that.

7 If it's just something, somebody trying
8 to get away with something, stop at nothing, you know, to
9 get away with something, you know, to take another human
10 being's life for absolutely no reason at all. I have a big
11 problem with that. I think that definitely deserves a death
12 penalty.

13 Q. Okay. From the aspect of actually
14 participating or being a juror in a death penalty case, you
15 don't have any hesitations heading into the process?

16 A. No, sir.

17 Q. Okay. Let me back up just a second and talk
18 to you. In Texas, we reserve the death penalty, the option
19 of the death penalty, just for murder and then only for a
20 certain subset of murder.

21 The murder in the course of committing
22 another felony like robbery, burglary, rape, if you kill a
23 police officer on duty, fireman, prison guard, if you kill a
24 young child under six, if you commit a mass murder, a serial
25 murder. Murder for hire, you hire somebody to kill your

1 spouse, that type thing.

2 Those are the only type cases that are
3 eligible for the death penalty in Texas. It sounds like
4 something you pretty much agree with, based on what you've
5 told us?

6 A. Yes, sir.

7 Q. Okay. Murder in Texas, you know, if you're
8 like me, you grew up talking about premeditation, which to
9 me means you kind of planned it. In Texas, premeditation is
10 not a legal requirement for murder or capital murder. What
11 we require is intent, just that it's an intentional act.

12 And intent can be formed in a split
13 second. You know, I can turn to him right now and decide I
14 don't like his tie, pull out a gun and shoot him. It would
15 be an intentional act.

16 A. Sure.

17 Q. Not necessarily premeditated, but certainly
18 that premeditation factor is something that you could take
19 into account, as you take that evidence and kind of run it
20 through these three questions, or run it through the filter
21 of these three questions. Does that make sense to you?

22 A. Yes, sir.

23 Q. Okay. And, again, I want to just emphasize
24 this. Because there's only two possible punishments for
25 capital murder. Once you've convicted somebody of capital

1 murder, one way to think about it is, they're sitting on a
2 life sentence at that point, okay? The only way they get
3 the death penalty is if those questions are answered yes,
4 yes, and no, okay?

5 So, you can see, I guess, you know, a
6 juror that uses that mental discipline that we talked about,
7 if they really worked through the questions, even though
8 they may very strongly be in favor of the death penalty, as
9 you've told us you are, but if they use that mental
10 discipline and work through the questions, they may answer
11 one of those questions in such a way that actually gives the
12 person that life sentence. Does that make sense to you?

13 A. Yes, sir.

14 Q. Okay. Does that seem fair to you?

15 A. Yes, sir.

16 Q. Okay. You wouldn't have any qualms about
17 doing that, as long as it was based on the facts and the
18 evidence?

19 A. No.

20 Q. Okay. Because we don't want jurors who come
21 out of that guilt phase and say, gee, this is a death
22 penalty crime I just heard. I don't care what the facts and
23 evidence is in the second phase, I'm just going to answer
24 those questions in such a way to ensure that this guy gets a
25 death sentence.

1 And that's what we want to avoid. We
2 want jurors to really work through the process, you know,
3 and let the chips fall where they may, so to speak, with
4 regards to the answers to the questions. Does that make
5 sense to you?

6 A. Yes, sir.

7 Q. Okay. Let's go through and talk one by one
8 about these Special Issues. If you could take just a minute
9 to read those three to yourself. They're phrased a little
10 bit differently than they were in the booklet and we can
11 visit about them.

12 A. (Prospective juror complies.)

13 Q. Did you get a chance to look at those?

14 A. Yes.

15 Q. Let's talk about the first one, Special Issue
16 No. 1. And, as I said, that's what we call the future
17 danger question. In a sense, we ask a jury to kind of make
18 a prediction about future behavior. We ask a jury, is there
19 a probability that this guy is going to be dangerous in the
20 future, basically, is that question.

21 Is that a type of question that you're
22 comfortable asking -- or answering? And by that, I mean,
23 you feel comfortable making that prediction, as long as you
24 have enough facts and information in front of you?

25 A. Yes.

1 Q. Okay. What type of evidence or facts do you
2 think would be important to you when you answer that
3 question?

4 A. Um, maybe past criminal history, maybe.

5 Q. That's typically what we hear. And, again, if
6 it exists, that's something that you get to hear in that
7 second phase of the trial. You know, a lot of people tell
8 us, I guess, that the best judge of future behavior is past
9 behavior, that type of thing. Anything else you can think
10 of?

11 A. (No answer).

12 Q. The question also talks in terms of
13 probability. And what does that word "probability" mean to
14 you?

15 A. Like a chance of, that it could happen again.

16 Q. And that's what a lot of people tell us. The
17 law gives us a little guidance. It says, you know, it's not
18 a certainty. We could never prove anything to you as a
19 certainty. But it's something more than a mere possibility,
20 because anything is possible. A chance or likelihood or
21 more likely than not, that type of thing. Is that something
22 you're comfortable with? That definition?

23 A. Yes, sir.

24 Q. Okay. Then we have that phrase "criminal acts
25 of violence." And the law doesn't necessarily restrict or

1 limit or define that phrase for us. So we always ask
2 everybody kind of what pops into their head, what type of
3 crimes, what type of acts, when they see that phrase,
4 criminal acts of violence?

5 A. What pops into my head?

6 Q. Yeah, what type of behavior?

7 A. Um, assault.

8 Q. Assaultive type offenses?

9 A. Yeah, rape.

10 Q. Okay. Anything, I guess, that involves
11 violence or the threat of violence?

12 A. Yes, sir.

13 Q. Okay. Kind of, I guess, the bottom line point
14 is the law doesn't necessarily require that we prove to you
15 that he's going to kill again or be involved in another
16 murder again, just that there's that potential for, I guess,
17 those assaultive acts, those crimes of violence, that type
18 thing. Does that make sense to you?

19 A. Yes, sir.

20 Q. Okay. And finally that word "society," how
21 would you define that?

22 A. Just --

23 Q. Everybody and anybody he would come into
24 contact with?

25 A. Yeah, your own neighborhood, just --

1 Q. Okay. How about society behind bars, like
2 other prisoners, wardens, teachers. You see how that could
3 include that society as well?

4 A. Yes, sir.

5 Q. Okay. And that's basically the question that
6 we ask, the future danger question. What's important to
7 remember about that question is, and the same thing with
8 question 2, they both start off with a no answer, okay? And
9 it's up to us, the State, as part of our burden of proof, to
10 prove to you as a juror that the answer to both of those
11 questions should be yes.

12 They start off with that no answer.
13 That's the default setting, basically. And you only answer
14 those questions yes, if the State has proved to you beyond a
15 reasonable doubt that the answer should be yes. Does that
16 make sense to you?

17 A. Yes, sir.

18 Q. Okay. You can't look to this table to bring
19 you anything or require him to testify. You've just got to
20 look to us always, and ask, did we meet our burden of proof?
21 And those two questions are very similar in that respect.

22 And, again, we kind of ask the juror to
23 go into this with an open mind and work through each of
24 these questions, kind of as an independent inquiry. You
25 know, just because you found a person guilty, doesn't

1 necessarily answer any of these questions for you. Or just
2 because you have answered question No. 1 in a certain way,
3 doesn't necessarily automatically answer question 2 and 3
4 for you.

5 We ask you to work through each
6 individually, kind of in a vacuum in a sense, and just work
7 through the questions. Does that make sense?

8 A. Yes, sir.

9 Q. Sometimes we run into problems with people
10 that tell us, you know, they say, very frankly, if I found
11 somebody guilty of capital murder and, you know, I believe
12 you proved it to me beyond a reasonable doubt that he's
13 guilty of capital murder, I'm always going to feel that he's
14 a future danger. And I'm always going to answer that
15 question yes. It's just automatic for me.

16 And to the extent, I guess, there's a
17 little bit of common sense into that. But, again, that law
18 requires you to keep an open mind. And I could probably sit
19 here and give you a thousand different hypotheticals where
20 you would probably find somebody guilty of capital murder,
21 but, you know, when you got to Special Issue No. 1, you
22 might not necessarily think they are a future danger. You
23 see kind of how that works?

24 A. Yes, sir.

25 Q. You know, you've got a small child and I'm

1 about to have one, so I'll use this example. You know, I
2 come home from work one day and find out my neighbor has
3 done something really bad to my daughter or son. I think
4 about it for a few days. I go next door, kick in his door,
5 commit burglary, and kill him because of what he's done to
6 my child.

7 I've committed capital murder. The jury
8 would find me guilty. But a jury may think, you know, hey,
9 you've lived a spotless life. You were just getting even
10 for what he did to your child. You're never going to be a
11 future danger, that type thing. Does that make sense to
12 you?

13 A. Yes.

14 Q. Okay. So, you know, the bottom line is we
15 just ask you to keep that open mind. Moving to question 2,
16 again, this is the Special Issue of punishment that deals
17 with that accomplice scenario.

18 That question basically breaks down into
19 three different parts. If you feel the person actually
20 pulled the trigger, they actually caused the death, you
21 would answer it yes. If you feel they didn't actually cause
22 the death, but intended the death of that person or another,
23 you would answer it yes.

24 Or, finally, that last line, if you find
25 beyond a reasonable doubt that the person anticipated that a

1 human life would be taken, you could answer that question
2 yes.

3 And I want to kind of back up for just a
4 second with you. Remember, in order to convict an
5 accomplice of capital murder, the jury has to think that
6 they should have anticipated that a life would be taken.
7 When we get to punishment, there's a different standard.
8 Instead of should have anticipated, it's actually
9 anticipate, okay? We've got a little higher standard as we
10 run the facts through these sets of filters. Does that make
11 sense to you?

12 A. Yes, sir.

13 Q. You may go back and very well look at the same
14 evidence. You know, a juror very well could believe, going
15 back to our scenario, not only should I have anticipated
16 that a life would be taken, but I actually anticipated it,
17 because he took a gun in.

18 It's a little bit higher standard, but,
19 you know, you just have to be able to kind of see that
20 difference between the two standards. Does that make sense?

21 A. Yes, sir.

22 Q. The best example I can think of is my first
23 car, okay? My dad gave it to me when I was 16. And I drove
24 it like a madman for about a month until I wrecked it. I
25 missed a corner and ran into a street pole. My dad was mad

1 at me, obviously. And he said, you know, you such and such,
2 you should have anticipated, driving a car like this, you
3 were going to wreck it, which, looking back, is true. But,
4 I guarantee you, I didn't actually anticipate it.

5 So that might be a situation, you know,
6 where a jury could think somebody should have, but they
7 didn't actually. Does that make sense to you?

8 A. Yes, sir.

9 Q. Okay. And when you're talking about
10 anticipation, you know, a person always has a right not to
11 testify, so you may not hear from that person to tell you
12 what he anticipated. And, you know, we can't open up a
13 person's head and kind of, you know, read their mind. So we
14 just kind of have to look at their actions and based on
15 their actions draw some conclusions or some inferences as to
16 what they actually anticipated. Is that something you feel
17 comfortable doing?

18 A. Yes, sir.

19 Q. Okay. Again, it starts off with a no answer.
20 If, and only if, we've proven it to you beyond a reasonable
21 doubt, do you move on to question No. 3. Again, this
22 question No. 3 is the last step in the process. It's what
23 we call the mitigation question.

24 We kind of ask a juror to step back, take
25 a deep breath, look at all the evidence they've heard in

1 both phases of the trial, look at the facts of the crime,
2 look at the defendant's character and background, what you
3 know about him, and look at what sort of personal moral
4 blame he bears, what culpability he bears in the offense.

5 And we ask you, looking at all of that,
6 is there something mitigating? And by mitigating we mean
7 something that lessens his personal moral blameworthiness,
8 okay?

9 A. Okay.

10 Q. And if there is something there, is it
11 sufficient that we ought to show him some mercy and his life
12 should be spared, that he should get a life sentence rather
13 than the death penalty. Does that make sense to you?

14 A. Yes, sir.

15 Q. Okay. Do you kind of see the, I guess, the
16 logic in having that question as kind of the last stop or
17 the failsafe question?

18 A. Sure.

19 Q. Okay. Do you see some value in having that
20 question?

21 A. Yes, sir.

22 Q. Okay. Because some people tell us, very
23 frankly, and this is where we run into a problem with some
24 people, they say, listen, you know, I found somebody guilty
25 of capital murder. I found they're a future danger. I

1 found they anticipated that a life would be taken. When I
2 get that far in the process, it's over. He's getting a
3 death penalty. There's no value in that question 3 for me.

4 And if you feel that way, that's fine.
5 You just wouldn't be a qualified juror. But we basically
6 ask people to keep that open mind to question 3. It sounds
7 like that's something you feel you could do?

8 A. Yes, sir.

9 Q. Okay. As you sit there, is there anything
10 that kind of pops into your head that might be potentially
11 mitigating in a case like this? I know that's a tough
12 question. I hope you don't sit around thinking about
13 mitigation in a death penalty case, but --

14 A. That's something that might keep somebody from
15 getting the death penalty?

16 Q. Yes, sir.

17 A. Maybe something in their background, maybe,
18 you know, something that happened to them when they were a
19 kid. I don't --

20 Q. And some people tell us that. Some people
21 feel that, you know, if a person had a bad background.

22 A. Their upbringing.

23 Q. Maybe, you know, physical, mental, emotional
24 abuse, that type thing. That could potentially be
25 mitigating, based on the severity or that type thing. Other

1 people think, you know, hey, my heart goes out to you. You
2 had a bad upbringing, but at some point you're an adult and
3 you're responsible for your own actions. Where do you kind
4 of fall on that end of the spectrum?

5 A. I guess in a case like that, I could probably
6 answer yes to both of the first two, you know, if somebody
7 had a really bad upbringing, you know, a lot of abuse or
8 something like that. And then, you know, maybe for No. 3, I
9 would -- I'd probably have to -- I would think a life
10 sentence would be probably more appropriate than the death
11 penalty.

12 O. Okay. So you could keep, you know, an open
13 mind to that mitigation?

14 A. Yes.

15 Q. Okay. Actually, the law doesn't require you,
16 as you sit there now, to tell us what you consider
17 potentially mitigating one way or another. Some people tell
18 us maybe a person's age. Just to let you know what the law
19 in Texas is, you can only be prosecuted for capital murder
20 and get the death penalty if you are 17 years of age or
21 older. You can be prosecuted for capital murder as a 15 or
22 16 year old, but you can't get the death penalty.

23 Some people tell us, you know, hey, if a
24 person is fairly young, 18, 19, 20, that might be
25 mitigating. Other people, again, say, you know, they are

1 adults, they can make decisions, that may not be mitigating.
2 What do you think about that?

3 A. I guess I think a younger person, that could
4 be mitigating. But I guess it would still depend on the
5 circumstance, to tell you the truth. I would go one way or
6 the other, just depending on the evidence.

7 Q. And, again, that's what the law requires,
8 before you've heard any facts. You know, we can't go into
9 this case, obviously, so -- but as long as you can keep an
10 open mind at this point. You don't even have to agree with
11 the other jurors what would be mitigating. One juror may
12 think something is mitigating and you may not agree.

13 The bottom line, again, is just that you
14 can consider it, if it exists, and give it, you know, be
15 able to weigh it one way or another and see some value in
16 that question, which you've told us you can.

17 Any questions at all about this scheme we
18 have, kind of how it works, or do you feel like you have a
19 good grasp of, you know, kind of, I guess, what to expect,
20 if you were a juror in this case?

21 A. I think I have a pretty good understanding.

22 Q. We've got that first phase, you look to us.
23 Did we prove it to you beyond a reasonable doubt that he's
24 guilty of capital murder? If the answer is yes, and he's
25 guilty, then you hear that extra evidence in the second

1 phase of the trial.

2 You keep that open mind, work through
3 each one of these questions individually, independently,
4 with no kind of preconceived notions or automatically
5 answering them. You'd just, again, let the chips fall where
6 they may and let the answers to the questions determine the
7 appropriate sentence. Does that make sense to you?

8 A. Yes, sir.

9 Q. Okay. Oftentimes in these type of cases, you
10 know, you're obviously probably going to hear from police
11 officer witnesses. A lot of people admire police officers
12 greatly for what they do and that's understandable. We're
13 glad of that. But what the law says is that you can't start
14 a police officer, you can't give them an extra leg up in
15 credibility, just because they're a police officer.

16 Basically, you have to start every
17 witness on that same level of credibility. Just because he
18 walks in wearing a badge and a gun, you know, you can't
19 automatically believe him just because he's a cop. Does
20 that make sense to you?

21 A. Yes, sir.

22 Q. Okay. Do you think you could start all
23 witnesses off on that same level of credibility?

24 A. Yes, sir.

25 Q. Okay. Oftentimes in these cases you may hear

1 from the defense, from the State, maybe both sides, from a
2 psychiatrist or psychologist in the punishment phase to try
3 to, you know, possibly give you some insight into question 1
4 or question 3. So, we always like to kind of get people's
5 gut reaction on those type of witnesses, psychiatrists,
6 psychologists, that type of thing. What do you think about
7 those type witnesses?

8 A. I mean, I think they can be helpful to jurors
9 to let them know kind of the mental health of whoever is
10 being tried, I would assume.

11 Q. Okay. You wouldn't, I guess, you know, we
12 talk to some people who kind of automatically close their
13 mind and just don't feel that's a real science or wouldn't
14 listen to them at all. But, you know, as long as you can
15 kind of -- kind of like police officers, start them on that
16 same level of credibility, you'd be qualified. Sounds like
17 something you could do?

18 A. Sure.

19 Q. Okay. You know, as I've told you, if the
20 questions aren't answered yes, yes, and no, the person gets
21 that life sentence. What a life sentence in a capital
22 murder case in Texas means is that a person has to do forty
23 years before they're eligible for parole. We don't have a
24 life without parole in Texas. It just doesn't exist. But
25 in a capital case, a person has to do forty calendar years,

1 day for day, before they see their first Parole Board.

2 Now, they may make parole first time up
3 after 40 years, or they may never make parole and actually
4 serve a life sentence. Because those decisions are kind of
5 beyond our control here in the courtroom and so far in the
6 future, we tell the juror what that means, but then we ask
7 them kind of to assume that a life sentence means a life
8 sentence, just to be fair to both sides, because we don't
9 know how it's going to end up.

10 A. Yes.

11 Q. So, is that something you feel you could do is
12 just presume a life sentence actually means a life sentence?

13 A. Yes, sir.

14 Q. Okay. Let me visit with you quickly about
15 these things called lesser included offenses, lesser
16 included offenses. This may come up in that first phase of
17 the trial, the guilt phase.

18 Let's say we're trying a case, murder in
19 the course of robbery, kind of going back to our example,
20 and you feel, for whatever reason, that the State didn't
21 prove it to you beyond a reasonable doubt, that maybe
22 Mr. Shook is guilty of that murder, maybe somebody else
23 committed it.

24 But you feel he's guilty of the robbery,
25 okay? So you may have a choice after that first phase of

1 the trial. As a juror, you know, you can find somebody
2 guilty of capital murder or guilty of the lesser included
3 offense of aggravated robbery or find them not guilty. Does
4 that kind of make sense to you?

5 A. Yes, sir.

6 Q. Okay. In that situation, if you do find
7 someone guilty of aggravated robbery, or in any situation
8 where you find somebody guilty of aggravated robbery, these
9 Special Issues don't apply. At that point we just ask a
10 jury to set punishment somewhere in the punishment range.
11 The punishment range for aggravated robbery in Texas is
12 anywhere from five years in the penitentiary all the way up
13 to 99 years or life.

14 And it's kind of the same question we
15 asked all along. You are probably sick of hearing me say
16 open mind. But we ask you as you sit there now, in order to
17 be a qualified juror, just in a given aggravated robbery
18 case, could you keep an open mind to that full range of
19 punishment?

20 A. Yes.

21 Q. Okay. Another way of asking that is, is if
22 you heard an aggravated robbery case where you thought the
23 right thing to do was a life sentence, could you do it? And
24 if you heard an aggravated robbery case where you thought
25 the right thing to do was five years, could you do it?

1 A. Yes.

2 Q. Okay. As long as you have that open mind, you
3 would be qualified. Let me talk to you, generally, a little
4 bit about some of the rules that apply in any criminal case.
5 We kind of touched on this already. A person that's accused
6 of a crime, a criminal defendant, can't be forced to
7 testify. They have a Fifth Amendment right not to testify.

8 You know, no one can force him to get up
9 there and tell his side of the story. You may want to hear
10 it. It's natural for people to kind of want to hear that.
11 But you can't require him to. You can't force him to.

12 If he doesn't testify, the Judge will
13 instruct you, this is what the law is, that you just can't
14 consider it in any way. You can't hold his failure to
15 testify against him. It's just a nonfactor. Does that make
16 sense to you?

17 A. Yes, sir.

18 Q. Okay. Is that something you think you could
19 do?

20 A. Yes, sir.

21 Q. And, again, that's part of enforcing our
22 burden of proof. You always have to look to this table to
23 see if we have met our burden. These folks over here don't
24 have to do anything. Legally, they can sit there and do
25 crossword puzzles, not ask a question, not call a witness.

1 That's not going to happen. They're good lawyers. But that
2 kind of illustrates the point that you always have to hold
3 us to our burden of proof.

4 Part of that, again, is the presumption
5 of innocence. As we sit here right now, Mr. Murphy is
6 presumed innocent. If for some reason we all quit this
7 trial right now and went home, he would be found innocent.
8 And the only way that presumption goes away is if we meet
9 our burden of proof, of proving each and every element of
10 the crime beyond a reasonable doubt.

11 When you looked at that indictment, and
12 we actually draw up that indictment, we draft it. And it's
13 kind of broken down into elements. Very basically, you know
14 that a certain person on or about a certain day in a certain
15 county killed a certain person in a certain way. Those are
16 kind of basically the elements of the crime.

17 And the law says that we have to prove
18 each and every element to you beyond a reasonable doubt and
19 that no one element is more important than another element.
20 Okay. Obviously, we've got to prove identity to you, the
21 person that committed the crime. If we don't do that, we
22 haven't proven an element. You'd find him not guilty.

23 Kind of an extreme example of that
24 principle, which I don't think will come up, but
25 nevertheless, I'll give it to you. You know, say you hear a

1 capital murder case and we've alleged as an element that it
2 happened in Dallas County. But when you hear the case, you
3 think it happened in Tarrant County. The cops didn't do
4 their job. We didn't do our job. We were grossly
5 negligent.

6 In that case we would have failed to
7 prove an element. No one element is more important than
8 another. It's just like identity. The law would require
9 you to find that person not guilty. Some people say that's
10 a technicality. You missed the county.

11 You know, I don't anticipate this would
12 ever come up. If it did, you could have our jobs. We would
13 be fired. And some people consider that a technicality.
14 But, you know, one person's technicality, I guess, is
15 another person's constitutional right. So is that a law you
16 feel like you could follow?

17 A. Yes, sir.

18 Q. And, again, you know, say we allege that a
19 person was shot to death with a gun. The evidence shows
20 that he was actually knifed to death, cut. We missed it.
21 We missed an element of the crime. You would have to find
22 him not guilty. Does that make sense to you?

23 A. Yes, sir.

24 Q. Okay. Any questions we've kind of gone over?
25 Seems like I've been doing all the talking. Do you have any

1 questions of me?

2 A. No, sir.

3 Q. You know, kind of the burden is on me to cover
4 all these legal points and to make sure you understand them.
5 Again, the bottom line is no matter how you may feel
6 personally or, you know, kind of in the -- in your other
7 life, when you come in here as a juror, you've got to take
8 an oath that you can follow the law, even if you may have to
9 set aside some of your personal views.

10 If you can do that and keep that open
11 mind and follow the law, you'd be a qualified juror. Hold
12 on just a second. Any questions, Mr. Pool?

13 A. No, sir.

14 Q. Okay. I appreciate your time. Thank you.

15 MR. WIRSKYE: That's all I have, Judge.

16 THE COURT: Ms. Busbee?

17 MS. BUSBEE: Thank you, Your Honor.

18 CROSS-EXAMINATION

19 BY MS. BUSBEE:

20 Q. Thank you for coming down, Mr. Pool.

21 A. You're welcome.

22 Q. We've talked to, gosh, many dozens of people
23 now and we still don't have a jury. And we didn't talk to
24 -- I don't know what the percentage is, but it's, let's say
25 it's a tenth of the people that come down or fewer, and we

1 still don't have a jury.

2 And that, you've got a puzzled look on
3 your face, but the reason for that is, is that you can see
4 this is more complicated than most things we'd ask someone
5 to do. And it doesn't make you a bad citizen, if you
6 disagree or don't feel comfortable with some of these
7 concepts. It makes you a good citizen, if you just tell us
8 how you feel about things.

9 We often use the example of laws people
10 don't like, like say, the income tax law. I might be kind
11 of liberal, if I was on a federal jury talking about some
12 income tax law. That's just because when you are in private
13 practice, you don't have any withholding and it's a big --
14 well, you've been self-employed, I think, before. You know
15 what that's like.

16 So there are no right or wrong answers.
17 And you haven't been drafted, because if, you know, if
18 forced to do so, I know you'd do your best. And Mr. Wirskey
19 has gone over some principles of law and has asked you if
20 that makes sense to you. Of course, it does. That's the
21 law that makes sense.

22 I want to ask you a little bit more about
23 some personal feelings. I see you going different ways in
24 different directions, like a lot of people do, because
25 nobody wants you to violate your conscience or to do, you

1 know, we'll just explore these things, if there are any
2 problems, because it's kind of like a job interview for a
3 job you really don't want. I suppose it would disrupt your
4 life a little bit to have to be down here for two weeks.
5 Are you prepared to do that?

6 A. Yes, ma'am.

7 Q. Okay. Well, first thing I'm going to ask you
8 about is, you made a comment, and let me preface this by
9 saying, we ask you all these questions without telling you
10 what the law is first. So you're not bound to these things.
11 You made the comment that you thought the death penalty was
12 used too little. Could you expound on that?

13 A. Just from the -- just from what you see on TV,
14 maybe some pretty brutal crimes that you might see on TV, it
15 seems like some people get some that, you know, in some
16 cases where you would think that they might get a death
17 penalty, you're always kind of a little taken aback that
18 they might not get as severe a punishment as you would
19 think, just from what you see in the media. But that's --

20 Q. Right. Sometimes we use this example of this
21 case that cut close to home, I think, for everybody, this
22 man in Park Cities who killed his wife in front of his kids
23 a few years ago. Do you remember that? That's not a death
24 penalty case under the law. It's one of those things that,
25 as disgusting as it may be, is not a death penalty case.

1 A. Sure.

2 Q. It just doesn't fall under that class. We
3 asked you some questions about your brothers and sisters. A
4 lot of people don't do this. I'm just curious as to what --
5 your sisters live here? Do they have jobs? What, for
6 instance, your sister Sheila, does she live in town?

7 A. Yes, well, she lives over in the Lake
8 Highlands area in Dallas.

9 Q. And is she one of the sisters whose husband
10 may be a bit on the liberal side?

11 A. No.

12 Q. She's not related to the Hawkins' that are the
13 subject of this case, is she?

14 A. No.

15 Q. Okay. Just curious. Well, I had to ask.
16 What about Michelle?

17 A. She works for the Dallas Community College
18 District. But she lives in Lake Highlands, also.

19 Q. Okay. Does she teach or --

20 A. She works in continuing education.

21 Q. What about, is it Desiree?

22 A. Desiree. She works for the City of Dallas.
23 She's a teacher.

24 Q. Okay.

25 A. Elementary school teacher.

1 Q. You're kind of in between, aren't you? Did
2 anybody in your family have any law enforcement background,
3 that kind of thing?

4 A. No. Sheila's husband, he's a fireman for the
5 City of Garland. But prior to that he did work down at Lew
6 Sterrett for a while. I think he was a jailor down there, I
7 believe.

8 Q. Have you had any conversations with your
9 family or the people at work about the fact that you were
10 coming down for this case?

11 A. Just mostly just with my wife.

12 Q. Now, you were asked this question about did
13 you keep up with what had gone on in some of these cases.
14 Did you know what the results were in some other cases?

15 A. I don't. I don't remember seeing -- honestly,
16 I'd almost forgotten about it until I -- until I got called
17 for jury. I didn't even realize that everybody hadn't
18 already been tried, or --

19 Q. Okay. Do you remember making the comment to
20 the juror in the back that some others had been convicted?
21 Do you remember telling her that?

22 A. I remember -- what did I say? I had thought
23 that they had already, that one had committed suicide and
24 that maybe the rest of them had already been tried and
25 convicted.

1 Q. Okay.

2 A. Or that I didn't think there was any -- I
3 thought that everybody else was -- that this was the last
4 person to be tried for the crime.

5 Q. Okay. We've talked to you about the
6 principles of law in general. But everybody knows a little
7 bit about this case. Have you formed an opinion as to what
8 should happen in this case?

9 A. I don't have an opinion, to tell you the
10 truth.

11 Q. Fair enough. I guess my thinking on this is
12 you've been asked whether you, um, these laws make sense.
13 But in your mind, and you're the only person that knows
14 yourself, you understand that once someone has been
15 convicted of capital murder, the law says that's a life
16 sentence. Can you feel that way and follow that?

17 A. Yes, ma'am.

18 Q. Okay. It's a life sentence. And it's only a
19 death sentence, if 1 is proved beyond a reasonable doubt,
20 and 2 is proved beyond a reasonable doubt. And despite
21 those factors, you still think a death sentence should be
22 imposed. That's the only way that happens. And we don't
23 really have any way -- you seem to be sincere to me and I
24 think that you are. I just want to hear it from you that
25 you would give this side a fair trial, if you were seated on

1 this jury.

2 A. Yes, ma'am.

3 Q. Because we don't have to put on anything. And
4 we shouldn't have to put on anything. But, you know, it's
5 going to be vigorously litigated, I anticipate.

6 A. Sure.

7 Q. So -- and having asked you that, you made some
8 mention about the fact that you would be interested in a --
9 in a typical death penalty case, about a person's childhood.
10 Could you expand on that? How did you, why is that
11 important to you?

12 A. I guess it's probably more so, now that I have
13 a little daughter and just, I don't know. The way kids are
14 raised or whatever, I think that has a definite influence on
15 how their -- the type of person they're going to be when
16 they're older.

17 I think if somebody is just mentally,
18 physically abused growing up, that that's -- I mean, not
19 that you shouldn't be held accountable in some way or
20 another for your actions later on, but I still think that,
21 you know, the degree of the sentencing, I would think that
22 that should play a factor in it.

23 Q. And it is a factor and certainly not the only
24 one, and it may not be persuasive. It just depends on the
25 facts.

1 What do you, do you have any comments
2 you'd like to make about this process or something that you
3 think I should know or maybe the State should know, your
4 feelings at this time?

5 A. I don't think so.

6 Q. Let me consult with my co-counsel here. Since
7 this is your last moment to speak, I'm going to see if there
8 is anything I missed on your questionnaire. Is there
9 anything that you're curious about that we haven't talked
10 about?

11 A. I don't think so. I don't know anything about
12 this so --

13 Q. Good. Well, I mean, we don't want an ignorant
14 jury.

15 A. Sure.

16 Q. We want, but we do, we like to prefer, or like
17 to think people are a blank slate.

18 MS. BUSBEE: I'll pass the juror, Your
19 Honor.

20 THE COURT: Thank you, Mr. Pool. If you
21 would be so kind and wait for us outside, we'll have you
22 back in just a few minutes.

23 PROSPECTIVE JUROR: Yes, sir.

24 [Prospective juror out]

25 THE COURT: What says the State with

1 juror No. 2975, Mr. Mark Christopher Pool?

2 MR. WIRSKYE: No challenge for cause,
3 Your Honor.

4 MS. BUSBEE: The defense has no challenge
5 for cause.

6 THE COURT: Would you like to step into
7 your office?

8 MS. BUSBEE: Yes, please.

9 (Recess)

10 THE COURT: What says the State?

11 MR. SHOOK: State accepts.

12 THE COURT: State accepts. What says the
13 defense?

14 MS. BUSBEE: We'll exercise a challenge
15 -- I mean a strike, sorry.

16 THE COURT: Ask Mr. Pool to come back in.

17 [Prospective juror in]

18 THE COURT: Mr. Pool, come on up. We
19 appreciate your time and service today and we'll inform you
20 that you are not going to be seated on this jury. Thank you
21 for your time and attention and you are free to go.

22 [Prospective juror out]

23 THE COURT: Mr. Walker.

24 [Prospective juror in]

25 THE COURT: Good afternoon, sir. How are

1 you?

2 PROSPECTIVE JUROR: Doing fine, thanks.

3 THE COURT: We have juror No. 3151, Hardy
4 Tom Walker, Jr. Welcome to the 283rd. Thanks for being
5 here on time or a little early. As you see, unlike what you
6 perceived, we do start on time. We're using your time and
7 we appreciate you being here. Did you have enough time to
8 review the guide I provided for you?

9 PROSPECTIVE JUROR: Yes, sir.

10 THE COURT: I also provided a copy of
11 your questionnaire. I hope you looked at that as well. The
12 objective here this afternoon is to bring you up to speed
13 and try to get you to understand how all the law relates.
14 It can be complicated. The attorneys will visit with you
15 and try to help you understand how it all works.

16 At the end of the process, I have two
17 questions I must ask you. Number one, do you understand the
18 law? And, number two, can you follow the law? That's the
19 big picture I have to look at. Only question I have for you
20 at this time is will you be able to serve this Court for a
21 period of two weeks beginning November 10th?

22 PROSPECTIVE JUROR: Yes, sir.

23 THE COURT: Thank you, sir. Mr. Shook?

24 MR. SHOOK: May it please the Court?

25 HARDY WALKER,

1 having been duly sworn, was examined and testified as
2 follows:

3 DIRECT EXAMINATION

4 BY MR. SHOOK:

5 Q. Mr. Walker, my name is Toby Shook. I'm going
6 to be asking you questions on behalf of the State this
7 afternoon. As the Judge said, there aren't any right or
8 wrong answers. Just -- we just want your honest opinions.
9 I'm going to follow up with some of the information you put
10 in your questionnaire, talk about capital murder, and the
11 rules and laws that apply to this case.

12 From reading your questionnaire, it looks
13 like you've been down on jury duty a lot over the years. So
14 you are probably familiar with the system. This is a little
15 different, because it's a capital case in which the State is
16 seeking the death penalty. We do this one-on-one interview.

17 We don't mean to make you feel like
18 you're the one on trial, putting you up on the witness
19 stand, but we have found it's a pretty good procedure for
20 getting information and you can ask questions at any time.
21 I see from your questionnaire that you work at Allstate?

22 A. Yes, sir.

23 Q. You're the property manager. And just kind of
24 tell us on a day-to-day basis what your duties are.

25 A. I work with offices across the state of Texas

1 for Allstate. Over the years I've leased the office space,
2 furnished them with equipment needed, put the signs up and
3 get the office up and running.

4 Q. Okay. And you've been doing that for a number
5 of years; is that right?

6 A. Yes, sir.

7 Q. Okay. Also in your questionnaire, you've been
8 down a lot of times, and in '99 you said you served on a
9 robbery case?

10 A. My wife did.

11 Q. Your wife did, okay. Have you ever gotten to
12 a jury, sat and listened?

13 A. No, sir.

14 Q. Okay. You got to go and listen to them talk,
15 but no one has ever -- you never had the privilege of
16 getting up and going through the whole process?

17 A. Correct.

18 Q. Okay. One area we get into is if you have
19 known anyone that has been through the criminal justice
20 system. And you said, I believe, it was your stepson
21 involving a DWI; is that right?

22 A. DWI and other assorted drunk and disorderly
23 charges.

24 Q. All having to do with alcohol?

25 A. Pretty much.

1 Q. Okay. Did you know or are you familiar with
2 the facts of those cases?

3 A. Not really.

4 Q. Okay. My concern is just this. Bottom line,
5 do you feel he was treated fairly by the criminal justice
6 system?

7 A. Yes.

8 Q. Okay. So you bear no grudge against any
9 police agency, DA's Office, or judge, or anything like that?

10 A. No.

11 Q. Okay. Let me talk to you a little bit about
12 capital murder. You know from what the Judge has told you
13 in the questionnaire that this is a capital murder case, so
14 we talk to each juror about their personal feelings about
15 it. How do you feel about the death penalty? Are you in
16 favor of it as a law?

17 A. Yes, sir.

18 Q. What purpose do you think it serves society?

19 A. A deterrent, hopefully.

20 Q. Okay. Has it been a belief you've held your
21 entire adult life?

22 A. Yes, sir.

23 Q. When you think of what's an appropriate death
24 penalty case, what types of crimes come to mind?

25 A. Premeditated murder, murder for hire, murder

1 of a police officer.

2 Q. Okay. If it were up to you, would you have
3 the death penalty for any crimes other than murder?

4 A. I can't think of any.

5 Q. Okay. In Texas, the system is set up just for
6 certain murder cases, and not every murder case qualifies as
7 a death penalty case. You have to have murder, which is an
8 intentional killing. You mentioned the word "premeditated,"
9 which a lot of jurors do. We really don't have
10 premeditation as part of our law.

11 But we have intentional killing, which
12 means the person has the intent to murder and they act upon
13 that intent. They have that specific intent, which is
14 probably similar. You can have that intent forming over
15 days at a time, which I think a lot of people describe
16 premeditation to us. Or it could just take a few seconds.

17 But you have to have that intent to kill.
18 It can't be an accident or anything like that. Also, you
19 have to have murder plus something else, such as a murder
20 that occurs during a felony. If someone goes in and robs a
21 convenience store and shoots the clerk, that could be a
22 death penalty case. Murder during the felony of a burglary,
23 breaking into someone's home and murder someone, during a
24 kidnapping, rape, or arson.

25 Also, murder of specific victims such as

1 a police officer on duty, which you have already named,
2 fireman, also, and prison guards, murder of a child under
3 the age of six, murder for hire, again, which you named, a
4 hitman situation, someone does it for money or some other
5 type of purpose, compensated in some way, and then more than
6 one victim, either your mass murder situation or the serial
7 killer situation.

8 But those are the only types of cases
9 which have been reserved for consideration of the death
10 penalty at this time. That list, generally speaking, from
11 your own personal point of view, do you agree with that list
12 as the types of cases that you feel should be reviewed for
13 the death penalty?

14 A. Yes.

15 Q. Okay. Now, when we talk about the death
16 penalty, we usually conjure up some example in our own mind,
17 usually involving the actual triggerman. But the capital
18 murder case is like any other crime. You may have more than
19 one individual committing an offense. You can have groups
20 of individuals committing a crime. You'd have accomplices.
21 Some people might be more involved than others, but they all
22 might be participating to some extent in a criminal
23 transaction.

24 The law says that if you do actively
25 participate, know what's going on, you can be found guilty

1 and can be punished. The same is true of capital murder.
2 If you had one triggerman, you may have accomplices. They
3 all may be, under the facts, could be prosecuted for capital
4 murder.

5 An example I often give is, let's say Mr.
6 Wirskye and I decide we want to rob the neighborhood bank.
7 Our plan is for me to go in there with a loaded gun. He's
8 going to accompany. He's going to have the bag. Once I
9 pull the gun out and threaten the tellers, get their hands
10 in the air, he goes in and starts loading the bag up with
11 money from the drawers.

12 During the course of that robbery, I
13 shoot one of the tellers intentionally. Maybe I don't like
14 the way they're looking at me, maybe he tells me one of them
15 is going for an alarm, but I shoot them intentionally.
16 We're caught leaving the scene, let's say.

17 Obviously, I could be prosecuted for the
18 death penalty and I could receive the death penalty,
19 depending on the facts, because I'm the actual triggerman.
20 The law says Mr. Wirskye could also be prosecuted for
21 capital murder as an accomplice. He could even receive the
22 death penalty under some circumstances or facts.

23 People feel differently about that. We
24 have some people that are for the death penalty, but if it
25 were up to them, they would reserve it just for the

1 triggerman. They feel it's only appropriate for the person
2 that causes that death.

3 If it were an accomplice, they would
4 reserve a different punishment, maybe a different crime,
5 some type of prison term. They just think that's fair.
6 Other jurors feel the other way. They feel that an
7 accomplice in a capital murder situation should be held
8 accountable, can be found guilty, and ultimately could even
9 receive the death penalty, even though they didn't actually
10 cause the death.

11 And people feel differently. They fall
12 one way or the other. We just want to get every juror's
13 honest opinions on that law. How do you feel about the
14 prosecution of an accomplice under a death penalty
15 situation?

16 A. I guess a lot would be how the law was
17 presented to me on that case.

18 Q. Okay. From your own personal point of view,
19 do you think it's fair to prosecute an accomplice for
20 capital murder?

21 A. If that's what the law says, then yes.

22 Q. Okay. Do you think it's fair that they could
23 get a death penalty?

24 A. Once again, if that's what the law says, yes.

25 Q. Okay. The law is this, that there's really

1 two ways you could do it. One, if they are actively
2 involved, they direct, aid, help, solicit, encourage, the
3 crime. They are not the triggerman. They can be found
4 guilty, could get the death penalty.

5 The other theory is called conspiracy.
6 If one or more persons conspire to commit one felony and
7 then someone in the event commits another felony to further
8 along the conspiracy, then everyone in the conspiracy can be
9 found guilty, if the jury believes that they should have
10 anticipated that a death could occur.

11 They may not -- they don't even have to
12 have the intent that someone die, if you believe from all
13 the surrounding facts that they should have anticipated
14 that, to get someone guilty. Again, the law, applied to the
15 fact situation I gave you, Mr. Wirskye and I entered into a
16 conspiracy, which is simply an agreement to commit robbery
17 of that bank, and while we're pulling that robbery off, I
18 commit another felony by shooting and murdering one of the
19 tellers.

20 He can be held accountable for that, even
21 if he didn't intend for me to do that or didn't intend for
22 anyone to die, if the jury believes from the facts he should
23 have anticipated someone could get killed, me going in there
24 with a gun, that sort of thing.

25 So he doesn't necessarily even have to

1 have that intent to be found guilty. Now, to get to the
2 death sentence, you'd have to have a situation where they
3 did anticipate someone would die, and it would all depend on
4 the facts.

5 Under those two theories of law is how we
6 can get someone convicted of capital murder. Is that a law
7 that you agree with and think could be fair, depending on
8 the facts?

9 A. Yes.

10 Q. Okay. Another way we have of asking is this.
11 If we can make you king for a day of Texas, give you a lot
12 of power, would you have a law on the books, as far as
13 capital murder goes, where an accomplice could receive the
14 death penalty, depending on the facts of the case?

15 A. Yes.

16 Q. Okay. Why do you think that would be
17 important to have that type of law?

18 A. To keep people from putting themselves in the
19 situation where things like that could happen.

20 Q. Okay. Deter groups of people committing those
21 types of crimes?

22 A. Yes, sir.

23 Q. Are there any factors you think would be
24 important to you from the standpoint of the prosecution of
25 accomplices in a death penalty situation?

1 A. I guess everything around it would be
2 important.

3 Q. All the surrounding facts?

4 A. Yes, sir.

5 Q. Okay. Their role, their knowledge of the
6 plan, that sort of thing?

7 A. Yes.

8 Q. Okay. Now, the way a capital case is set up,
9 it's divided into two parts. You have the guilt/innocence
10 stage and the punishment stage. The guilt/innocence stage,
11 we have to prove to you the indictment beyond a reasonable
12 doubt. If we fail to do that, the jury finds the defendant
13 not guilty, and everyone goes home.

14 If we are able to meet our burden of
15 proof, though, the trial is not over. You move to the
16 punishment phase and you can hear additional evidence at
17 that time. And then you get these questions which we call
18 Special Issues, which we'll talk in a little more detail in
19 a minute.

20 But to put it somewhat succinctly, the
21 State has to prove in the punishment phase that the
22 defendant would be a continuing danger to society, we have
23 to prove that he either caused the death or anticipated that
24 a death would occur, and that there is not sufficient
25 mitigating evidence to warrant a life sentence rather than a

1 death sentence.

2 But a yes, a yes, and a no to those
3 questions equals a death sentence. The Judge would have no
4 discretion. If the jury answered that way, he would then
5 sentence the defendant to death. If you answered them any
6 other way, again, he would have no discretion. He would
7 sentence the defendant to life.

8 But those are the only two possible
9 outcomes once a defendant has been found guilty of capital
10 murder, death or life. And it all depends on how the jury
11 answers those questions. Is that clear to you? Is that
12 clear to you?

13 A. Yes, sir.

14 Q. Okay. Are you familiar with the method of
15 execution in Texas?

16 A. Lethal injection.

17 Q. That's correct. You probably know from living
18 here that Texas is actually a state that not only prosecutes
19 the death penalty, but actually carries it out. Texas, in
20 fact, leads the nation in executions. There are some states
21 that have it on the books, yet they never prosecute it, or
22 if they do, they never actually carry it out. But we do
23 here in Texas. So we're talking about a very real
24 punishment.

25 The laws and rules and procedures in a

1 death penalty are the same in every case. If the defendant
2 in this case were found guilty and the questions were
3 answered in that way, he would be sentenced to death, and he
4 would be housed on death row. At some point in time the
5 Judge would actually give him a date of execution. The day
6 before that date, he would be moved to downtown Huntsville,
7 where all executions take place by law in a prison unit
8 there.

9 On the date of his execution, he's given
10 time with family, friends, a minister. He's given a last
11 meal. But at 6:00 p.m. by law the execution takes place.
12 He's taken into that chamber, which often there's photos of
13 it that appear in the news. You may have seen it. There's
14 a gurney there with leather straps. He's secured there.
15 Needles are placed in his arm. Tubes go into an adjacent
16 room where the executioner sits and then witnesses are
17 brought in.

18 You have one side of the room, it's a
19 divided room, that has the victim's family or friends, and
20 the other side, the defendant's family or friends. After
21 they're assembled, the warden allows him an opportunity to
22 make a last statement, which is frequently carried in the
23 news or newspapers. He may proclaim his innocence, he may
24 ask for forgiveness, it could be anything.

25 But after that, the signal is given and

1 lethal substances are injected into his body, which would
2 cause the heart to stop, the lungs to shut down, and he
3 would lapse into a coma within ten to fifteen seconds.
4 That's the procedure that occurs in every case. It would
5 happen in this case.

6 And, quite frankly, that's our goal in
7 this case. We feel we have the type and quality of evidence
8 to convince a jury of the defendant's guilt, convince them
9 that these questions should be answered in such a way that
10 he would be executed in the manner I described.

11 Now, you've told us philosophically from
12 your own personal point of view, you do believe in the death
13 penalty as a law, and it should be prosecuted, that you
14 believe in it as far as the law of accomplice goes, that it
15 could be prosecuted and be fair for an accomplice to receive
16 the death penalty.

17 We get all kinds of folks down here. You
18 remember a lot of people in that room, I'm sure, when you
19 filled out the questionnaire. Everyone feels different, but
20 what I need to know is, do you feel you're the type of
21 person, as you know yourself best, who could actually, after
22 listening to the evidence, take pen in hand and answer these
23 questions in a way, knowing that the defendant would be
24 executed some day, if you answer them yes, yes, and no?

25 A. Yes.

1 Q. Okay. Fair enough, then. Let's talk for a
2 minute about these Special Issues. If you'll take a moment
3 just to read Special Issue No. 1 to yourself and we'll go
4 over that one.

5 Let me back up one moment. You know, on
6 the questionnaire we have one question about publicity.
7 This case received an awful lot of publicity and almost
8 every juror read something in the newspaper or heard
9 something on the radio or saw something on TV. And I
10 believe you were no exception to that.

11 That doesn't make you ineligible to be a
12 juror, but we like to explore with each juror what they
13 recall hearing about the case. What facts do you remember
14 about the case when it was covered?

15 A. As I recall there were seven criminals, I
16 think in Huntsville, that escaped and ended up in Irving, I
17 think committing a robbery of an Oshman's. And Irving
18 police officer Aubrey Hawkins, I guess, came upon them and
19 there was a gunfight and he was killed. And then they
20 disappeared for a while and were eventually apprehended, I
21 think in Colorado.

22 Q. Okay. Did you follow any of the proceedings
23 after their apprehension?

24 A. I maybe read a piece or two in the paper, but
25 not in depth.

1 Q. Okay. You sound like most other jurors. You
2 remember some general details. And, again, that doesn't
3 make you ineligible to be a juror. The rule is this, kind
4 of just a common sense rule. As a juror you have to make
5 your decisions just based on what you hear in the courtroom,
6 from the witness stand and from any other evidence. You
7 can't rely on any newspaper reports or what you saw on TV to
8 influence you in any way.

9 We can't very well ask you to forget or
10 blank that out of your mind. That's impossible. But what
11 the Court requires of the jurors is to be able to make their
12 decisions just based on the evidence, and not let any
13 outside influences from the news media come into their
14 deliberations, recognizing that the best source is going to
15 be the direct source from the witnesses.

16 The news media, as you probably know, are
17 not always accurate. They are not always reliable and
18 that's why we must require the jurors to make their
19 decisions just based on the evidence here in the courtroom.
20 Do you feel you could do that, if selected as a juror? And
21 these are all hypothetical situations, but as selected as a
22 juror, could you just make your decisions based on the
23 evidence you hear and the witnesses that testify here in the
24 courtroom?

25 A. Yes.

1 Q. Okay. Now, this first Special Issue, you
2 don't get to unless you have found the defendant guilty.
3 Again, that doesn't mean the trial is over. You may hear
4 additional evidence at this point in time and then you get
5 these questions. Special Issue No. 1 starts out with a no
6 answer. And the State has to prove to you beyond a
7 reasonable doubt it should be answered yes. We have the
8 burden of proof on it.

9 Looking at Special Issue No. 1, you see
10 where that question is asking you to make a prediction about
11 how the defendant would behave in the future. Do you feel
12 you could make that type of prediction, if you were given
13 sufficient evidence and facts?

14 A. Yes.

15 Q. Okay. What types of things would you want to
16 know before you answered that question?

17 A. Prior bad acts.

18 Q. Okay. You can hear that type of evidence, if
19 it's available. Prior crimes, you can even hear from the
20 witnesses. You can hear good things and/or bad things, just
21 all of a person's life, in making that determination, as
22 well as reviewing, again, the facts you heard in the
23 guilt/innocence stage, the facts of the crime, and the
24 defendant's role in it.

25 And you get to use all that information

1 to answer that question. The question asks if there's a
2 probability the defendant would commit criminal acts of
3 violence. What does "probability" mean to you in terms of
4 that question?

5 A. There's a decent chance that it could happen.

6 Q. Okay. That wording will be, the definitions
7 are actually left up to you and the other jurors. The
8 guidelines the Court has given us is this. On probability,
9 it doesn't mean a certainty, because I don't think we could
10 ever prove a certainty on anything in a court of law. And,
11 also, it's obviously more than just a possibility.

12 You said -- you used -- well, one of the
13 terms the courts use is more likely than not, language like
14 that, obviously, a lot more than a possibility, but less
15 than a certainty. Does that make sense to you?

16 A. Yes.

17 Q. Okay. We have to prove that he would commit
18 criminal acts of violence. When you see "criminal acts of
19 violence" there, what does that mean to you?

20 A. Murder, aggravated robbery, assault, rape.

21 Q. Any type of threat or harm to another human
22 being?

23 A. Yes.

24 Q. Okay. Now, this question is answered
25 separately. The fact that you've found someone guilty does

1 not mean that's a yes answer, because if you'll recall, it
2 starts out with a no answer. The law contemplates that some
3 capital murderers, someone who has been convicted, are going
4 to get a death sentence, and some are going to get a life
5 sentence. It all depends on the evidence and the facts
6 unique to their case.

7 There are no automatic answers. You
8 don't automatically check in the yes because you found them
9 guilty. What you're going to have to do as a juror is wait
10 and listen to the evidence, and then determine what you
11 think is the right thing to do, and if the State has proven
12 this to you beyond a reasonable doubt.

13 We can't preview the facts. We give
14 examples sometimes. One would be, let's say it was a
15 situation where I was being prosecuted for capital murder.
16 My children had been harmed by someone in the neighborhood.
17 I knew that and I knew who it was. But maybe they were the,
18 let's say, the mayor's son or the police chief's son, so
19 nothing was happening to them.

20 And out of frustration after several days
21 of thinking about it, I go kick his door in and I kill him,
22 because I know, I'm afraid, you know, my children are going
23 to get hurt, or I'm mad about what happened. The breaking
24 in and killing someone in their home is a capital murder.

25 But maybe I have a spotless record, and

1 taking in those circumstances in which I did that, a jury
2 might look at question No. 1 and say, he's guilty of capital
3 murder, but this is just a one-time incident in his life,
4 and it involved his kids. He's not a continuing danger to
5 society.

6 Other situations might show me with a
7 prison record a mile long. I'm a selfish, greedy person,
8 and killing out of just grief. So it depends on the facts
9 of each case.

10 What the law requires is each juror will
11 wait, listen to the new evidence that would come in the
12 punishment stage concerning the person's background, both
13 good and bad, and then the guilt/innocence evidence, and
14 then make that determination. Do you feel you could do
15 that?

16 A. Yes.

17 Q. Okay. It's kind of a common sense approach,
18 again. It's something I'm sure you'd apply in your personal
19 life, in your business life, before you make a major
20 business decision. You, obviously, probably gather all the
21 facts in from all sources and then make that decision.
22 That's what the law contemplates here. No automatic
23 answers. You'll wait and evaluate it from its own point of
24 view after all the evidence is in.

25 Special Issue No. 2, that's the situation

1 involving the law of parties. If you'd look at that just
2 for a moment. That's the question when we first talked
3 about the law of parties, to get someone guilty, we have to
4 prove to you that they should have anticipated that a life
5 would be taken. And here it's still parties, an accomplice
6 situation. We have to go a step further and prove to you
7 that they did anticipate.

8 And it covers several areas. The first
9 part asks whether the defendant actually caused the death.
10 If you think they're the actual triggerman, let's say, that
11 part of the question is answered.

12 The second part of the question comes
13 into the accomplice situation. If they didn't actually
14 cause the death of the deceased, but intended to kill the
15 deceased, you could answer it yes, if that's what their
16 intentions were, or another, or anticipated that a life
17 would be taken. That "anticipated" is the area we've gone
18 over before.

19 To get him guilty we have to prove that
20 he should have anticipated and to get the answer to that
21 second question is he actually did anticipate. And it may
22 be the same exact evidence or it may be additional evidence
23 you learn about their background. But you have to be able
24 to look at the difference and see the difference and apply
25 that difference.

1 One example we give sometimes is you may
2 have a young teenager gets his car for the first time when
3 he's 16. And you know how teenagers can be. They may drive
4 that car a little recklessly. After a couple of weeks, he
5 may wreck that car. Father comes to him, what were you
6 thinking, driving over, you know, going cross country,
7 driving over curbs, that sort of thing. Didn't you realize,
8 if you drove that way, it could break the car?

9 Well, maybe at 16 he didn't. But,
10 obviously, years later, if he drove it that way, he would
11 have anticipated. And he should have anticipated, but
12 perhaps he didn't. And what we look at is, the first part
13 is the "should have." But to get to that death sentence
14 it's a step longer. Not only should they have anticipated,
15 but they actually did. You see the difference there?

16 A. Yes.

17 Q. Okay. Again, it might be the same evidence.
18 And we can't open a person's mind up to show you their
19 intent. But what a jury does is use their common sense,
20 make reasonable deductions from the evidence, and try to
21 determine a person's intent, just from their actions and
22 their role in the crime. Do you feel you could do that?

23 A. Yes.

24 Q. Okay. The question starts out with a no
25 answer. We, again, have to prove to you beyond a reasonable

1 doubt it should be answered yes. The same rules apply.
2 You'd wait until all the evidence is in and then make your
3 decision. No automatic yes, just because you found him
4 guilty or answered yes to No. 1. You would look at it
5 independently. Do you feel you could do that?

6 A. Yes.

7 Q. Okay. And then this last question is the
8 mitigation question. If you'd just take a moment to read
9 that to yourself. It gets a little lengthy, but it covers
10 just about any situation that might come up. You don't get
11 to it, unless you've found him guilty. You've already found
12 he's a continuing danger, and you've already found that he
13 either caused the death or intended someone to die.

14 But what the law says, that even despite
15 those findings, you keep your mind open and review all the
16 evidence of the case, all their background, all their
17 character evidence, and if you think there's sufficient
18 mitigating evidence where the fair thing to do is to give a
19 life sentence, you could do that. And if you don't think
20 it's there, you could answer it no.

21 We don't have the burden of proof on this
22 particular question and they don't have the burden of proof.
23 You just kind of have to call it as you see it after
24 reviewing all the facts.

25 As a juror today you don't have to tell

1 us what you think mitigating evidence would be. You're not
2 going to get a definition of it. You just have to be able
3 to promise the Court, I can keep my mind open to it. If I
4 think something is sufficiently mitigating in a person's
5 background or their role in the crime, then I can answer the
6 question that way. If not, I'll answer it no. Do you feel
7 you could do that?

8 A. Yes, sir. But I have a question.

9 Q. Okay.

10 A. So no one presents any evidence on this
11 whatsoever, character reference --

12 Q. No. We may be presenting evidence, but we
13 don't have a burden of proof like we do on these other
14 questions.

15 A. Okay.

16 Q. You can anticipate that the defense will, if
17 they think something is mitigating, they may put on an
18 expert. They may put on some character witnesses, some
19 background witnesses. And we, obviously, will put on
20 witnesses which might cut against that mitigation. I think
21 common sense-wise you will realize we're going to be arguing
22 one way and they will be arguing another.

23 But the difference in that question is,
24 the first two we have the burden of proof and this one we
25 don't. And it could be, you know, one juror might look at

1 something we brought up and think that's mitigating.
2 Another juror might think it's something that the defense
3 brought up. The bottom line is you just have to keep your
4 mind open to it. Do you feel you could do that?

5 A. Yes, sir.

6 Q. Okay. Just as a gut reaction, we ask every
7 juror this. As you sit there today, does any type of
8 evidence come to mind that you might view as potentially
9 mitigating?

10 A. No, sir.

11 Q. Okay. Most people tell us that, which kind of
12 reassures us, because I don't think most people hopefully
13 aren't sitting around in their free time thinking of these
14 type things. But mitigating could be anything. Sometimes
15 you hear about a way a person was raised, maybe they came
16 from a bad background, maybe they were abused, physically or
17 mentally, maybe they have a poor background.

18 Some jurors feel that could be mitigating
19 if it's severe enough. Other jurors tell us, I'd feel bad
20 for the person, sympathy, but once you're an adult you have
21 to be held accountable.

22 Do you feel one way or the other about
23 that type of background information?

24 A. Um, I believe that people in general should be
25 held responsible for their actions.

1 Q. Okay. A lot of people feel that way. Might
2 be something about their mental background, maybe they're
3 slower than others, through no fault of their own. That
4 could be something that some people view as mitigation,
5 things like that. It could be just really anything.

6 But the bottom line is if your mind is
7 open to it and if you think it is sufficiently mitigating
8 you can answer the question that way. It's another process
9 of waiting until all the information is in and then making
10 the decision. Do you feel you could do that?

11 A. Yes.

12 Q. Do you feel that's a fair question in a death
13 penalty situation to be able to grant someone a life
14 sentence, depending on the facts?

15 A. Yes.

16 Q. Okay. That's all the law really contemplates.
17 Let me go over a few rules that apply to each case and these
18 will be familiar to you, because we're kind of raised up on
19 these rules in our schooling.

20 Presumption of innocence. Every
21 defendant is presumed to be innocent at the beginning of the
22 trial. The fact that they've been arrested or indicted or
23 that we're going through this process, is no evidence of
24 their guilt. The State has to overcome that presumption by
25 presenting evidence and witnesses. But at the beginning of

1 the trial, you must presume him to be innocent.

2 Could you follow that rule, presume him
3 to be innocent, and require us to prove our case to you?

4 A. Yes.

5 Q. Okay. The burden of proof never leaves this
6 table. It never leaves the State of Texas. It's always on
7 the State of Texas and it never shifts. The defense is not
8 required to prove his innocence to you. You may anticipate,
9 it's common sense, that they are going to try hard, they're
10 going to present evidence, they will make arguments or ask
11 questions. But they're not -- they don't have to under our
12 law because the burden of proof never leaves this table and
13 shifts to them.

14 If at the close of the trial they didn't
15 ask any questions, but you had a reasonable doubt based on
16 the evidence we presented, you'd simply find the defendant
17 not guilty. You can't turn around and go, okay, they had
18 their shot, now you prove his innocence, because that burden
19 of proof never leaves that table -- this table.

20 Do you feel you could follow that rule of
21 law, require us to prove our case beyond a reasonable doubt,
22 and not require the defense to prove innocence to you?

23 A. Yes.

24 Q. Okay. The burden of proof goes to each and
25 every element of the indictment. We write the indictment;

1 therefore, we have to prove every bit of it beyond a
2 reasonable doubt. If we fail on just one part of the
3 indictment, then the jury is obligated under law to find the
4 defendant not guilty.

5 Let me give you a couple of examples. We
6 have to prove who committed this crime. At the close of the
7 trial, if you had a reasonable doubt about the identity of
8 the killer, common sense would tell you it would be a pretty
9 quick not guilty. That's one of the elements of the crime.
10 However, just as important under the law is where the crime
11 occurred, such as Dallas County. We have to prove that to
12 you beyond a reasonable doubt.

13 Now, I'll give an example which I don't
14 anticipate happening, but it demonstrates this point. If we
15 prove -- put on a case and at the end of it, let's say the
16 crime occurred near the county line. And you felt that the
17 crime actually occurred way over in Tarrant County. That
18 would be a reasonable doubt. Now, that would also indicate
19 we're pretty bad prosecutors and bungled the case in our
20 preparations.

21 But a juror can't help us out and say,
22 you know what, I'm going to give them that, and that's a
23 technicality to me. I don't care where it happened. You
24 have to, if you have a reasonable doubt about any portion,
25 even Dallas County, find the defendant not guilty.

1 You may not like it, you may have us
2 fired that day, probably. But you can't help us out. Could
3 you follow the law in that respect and require the State to
4 prove its case beyond a reasonable doubt on each and every
5 element of that indictment?

6 A. Yes.

7 Q. Okay. The Fifth Amendment comes up from time
8 to time. If someone is charged with a crime, they can
9 testify and no one can stop them. You judge them like any
10 other witness. But if they choose not to testify, the Judge
11 would instruct you that you can't hold that against them.
12 It can't be used as evidence against them. You can only
13 base your decision based on the evidence you've already
14 heard.

15 There could be a number of reasons why
16 someone may not testify. They may not be very well
17 educated. They may not perform well in front of people.
18 They may be very nervous and look guilty when they're not.
19 They may simply be following their lawyer's advice. The law
20 takes care of that by instructing the jurors you can't hold
21 that against them and can base your decision based only on
22 the witnesses you heard. Could you follow that rule of law?

23 A. Yes.

24 Q. Okay. Police officers often testify in
25 criminal cases. People have respect for the job they do,

1 but you can't start them out ahead of other witnesses. You
2 have to wait and judge them like you would any other
3 witness, recognizing there are good police officers and bad
4 ones. You just have to wait and judge them like you would
5 any other witness. Could you do that?

6 A. Yes.

7 Q. Finally, the parole laws are sometimes brought
8 up in the news. The Judge would tell you in a capital
9 murder situation, a capital life sentence means the
10 defendant would have to serve forty calendar years before
11 they became eligible for parole. Even then, that doesn't
12 mean they'd be paroled. And he would also instruct you that
13 you can't consider the parole laws at any time in your
14 deliberations. You must simply consider a life sentence, a
15 life sentence. Do you feel you could do that?

16 A. Yes.

17 Q. Okay. I don't know if this would happen or
18 not, but sometimes there are lesser included offenses that
19 are considered by a jury, and sometimes they find the
20 defendant guilty of a lesser included offense. A lesser
21 included offense in a capital murder situation is aggravated
22 robbery. If you found the defendant guilty of aggravated
23 robbery, the penalty range changes. You don't get these
24 questions. It's simply a matter of years that come into
25 play.

1 The law contemplates that you would wait
2 and listen, again, for all the punishment evidence, good and
3 bad, to come in, and then make a decision on the term of
4 years. It can be anywhere from a life sentence all the way
5 down to as little as five years in prison.

6 If you feel it's appropriate that a
7 five-year sentence be given, based on the crime and the
8 background evidence, you could do that. Or as much as 99
9 years or life in prison, you could do that, or anywhere in
10 between.

11 Do you feel you could keep your mind open
12 to that full range and assess the proper punishment based on
13 what you feel the evidence shows?

14 A. Yes.

15 Q. Okay. That's kind of the bottom line, and I
16 know I've been repeating myself, but certain people won't do
17 that. You seem to be the type of person that is able to
18 have that mental discipline to keep their mind open, require
19 the State to prove these things, and look at these questions
20 and these issues all separately, which is what the law
21 contemplates. Do you perceive any problem in doing that at
22 all?

23 A. No.

24 Q. Okay. We've gone over a lot of different
25 information and rules and laws that apply. Do you have any

1 questions over anything that we've gone over?

2 A. No, sir.

3 Q. Okay. Let me check a few more things and I
4 may be done. Oh, there is one area I left out. In the
5 punishment phase you sometimes hear from psychologists or
6 psychiatrists from the defense side, sometimes from the
7 prosecution side, sometimes from both. They can offer
8 opinions about a person's future danger. They may offer
9 opinions about mitigation, why a person acts that way.
10 Sometimes they don't testify, sometimes they do.

11 Now, sometimes jurors look at that, at
12 psychologists or psychiatrists, and they put a lot of faith
13 in them. They actually think that's very valuable
14 information, would follow their opinions pretty much. Other
15 jurors kind of are the opposite way. They think that's --
16 they term it a soft science. They think if you look hard
17 enough, long enough, paid enough money, you're going to find
18 someone that's going to come up with a theory that helps
19 you.

20 Then you have other jurors that say, I
21 would look at it, but it's not going to weigh of any
22 particular importance to me. It's going to be another piece
23 of the puzzle. I'll weigh it as well as all the other
24 evidence I hear. Do you have any opinions one way or the
25 other about those types of experts?

1 A. I would want to hear their credentials and
2 what they have to say.

3 Q. Okay. Would you just want to listen to them
4 like you would any other witness in the case, then?

5 A. Yes.

6 Q. Okay. You feel they might be credible and
7 then, again, they may not, it's just going to depend on that
8 individual witness and what they know?

9 A. Yes.

10 Q. Okay. Fair enough, then. Well, I appreciate
11 your patience with me. I know I've covered a lot, but
12 that's all I have, and I'll turn you over back to the Judge.

13 MR. SHOOK: Thank you, Your Honor.

14 THE COURT: Mr. Sanchez?

15 MR. SANCHEZ: Thank you, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. SANCHEZ:

18 Q. How are you doing today, Mr. Walker? Or Mr.
19 Hardy, oh, Mr. Walker, I'm sorry. I wanted to call you
20 Mr. Hardy. Do you ever get that or am I the only person
21 that's ever done that?

22 A. Once in a while.

23 Q. Okay. Mr. Walker, you know when Mr. Shook,
24 here, was speaking to you, he's asking you a lot of
25 questions and asking for a yes or no answer. And you've

1 told us you can follow the law. And, you know, what I want
2 to know is what you think about the law. A couple of times
3 you said, well, if that's what the law says.

4 And so, what I really want to explore
5 with you is, what do you think about the law? Because
6 sometimes there's people that say, I can follow the law, and
7 the more we ask them questions, you know, we get the sense
8 that they can't, or put in a certain situation they may not
9 agree with the law. But when we just ask it like that, in
10 an abstract, everybody can say they can follow the law.

11 There's no right or wrong answers, you know.
12 I just want to get your true feelings as to what you think,
13 okay? Is that fair enough?

14 A. Yes, sir.

15 Q. Okay. I see you live in Irving. Do you still
16 live there right now?

17 A. Yes.

18 Q. Okay. And you lived in Dallas County for 33
19 years. Has that always been in Irving?

20 A. No.

21 Q. What other places have you lived in?

22 A. Initially Dallas proper, Garland, and Irving.

23 Q. Okay. How long have you lived in Irving this
24 time?

25 A. Seventeen years, plus or minus.

1 Q. Okay. So it would be fair to say that in
2 Irving, I guess this was big news when you heard about it,
3 probably..

4 A. Yes.

5 Q. Because it happened in Irving, obviously, the
6 allegations are that it happened in Irving, and there's no
7 way to get around, sometimes, the media's coverage of it or
8 people talking about it. And that's why, you know, when
9 we're sitting here asking questions, you know, we have to
10 know, you know, what kind of opinions you've formed about
11 this case, if you have any opinions that you've formed.

12 So what do you think about that? Have
13 you formed any opinions already before you've heard any
14 evidence or based on what you heard from the media?

15 A. It was a terrible thing that happened.

16 Q Okay. Have you formed any opinions as to Mr.
17 Murphy's guilt or the guilt of the people who were involved?
18 Because if you have --

19 A. Based on evidence, no. Based on the media,
20 you know that it happened.

21 Q. Okay. And when you say that, I mean, does
22 that mean that you have already maybe formed an opinion
23 going into this trial that this person may be guilty or not
24 guilty?

25 A. I don't know what his part was in this. I do

1 know that someone was killed.

2 Q. Okay. But you have not formed any opinions as
3 to his participation, if he participated at all?

4 A. I don't know what happened.

5 Q Okay. All right. Mr. Shook talked to you
6 about a sentence of life in prison, you know, we hear that a
7 lot. Did it surprise you at all that that was an option in
8 a capital murder case where it involves the death of a
9 police officer, that life would even be an option?

10 A. No.

11 Q. Okay. And life in prison, what do you think
12 about that? I mean, is that a harsh sentence for you? I
13 mean, we've had people come up here and say, well, you know,
14 that's a slap on the wrist for some people. What do you
15 think about that? What do you think about the sentence of
16 life in prison?

17 A. I'm not sure it's not worse than the death
18 penalty.

19 Q. Okay. So you wouldn't see it as a slap on the
20 wrist? Not that I'm saying you should. I'm just saying
21 that sometimes we've had people that tell us that, and
22 that's why I ask that question. And they say because I
23 consider it to be a slap on the wrist, in this type of case,
24 I could probably, I probably couldn't even consider it in a
25 capital murder case. But you're telling us today, then,

1 that you -- it would be a consideration for you?

2 A. Yes.

3 Q. Okay. And that's kind of the way the law is
4 set up, okay? We have jurors that come in here and are
5 surprised at the, you know, the death penalty scheme is set
6 up the way it is, the way it's been explained to you quite
7 well by the State. You know, they come in here thinking,
8 well, you know, once someone is found guilty of capital
9 murder, why are we even dealing with these Special Issues?
10 Shouldn't it just be an automatic death penalty? So they're
11 surprised to hear those kind of things.

12 And the reason the law is set up that way
13 is because the law favors that a life sentence be imposed
14 over a death penalty, unless these Special Issues are
15 answered the way Mr. Shook told you they would be answered
16 for the death penalty being imposed. Does that make sense
17 to you?

18 A. Yes, sir.

19 Q. Okay. You can look at it a couple of ways,
20 but one way is, you know, these are hurdles that have to be
21 overcome before a death penalty could be imposed. Do you
22 think that's fair?

23 A. Yes.

24 Q. Okay. And the reason we ask all these
25 questions is because, you know, there are some jurors that

1 those Special Issues may not have that much value to them.
2 Once they find somebody guilty of capital murder, you know,
3 they'll look at them, may not consider them as much as the
4 law contemplates they should, because in their mind those
5 are things that get in the way of granting the death
6 penalty. What do you think about people like that?

7 A. They shouldn't do that.

8 Q. Okay. And that's what the law says, you know.
9 And what I hear from you is that you would consider them,
10 give them serious consideration, and have the State prove
11 them to you the way they told you they would have to?

12 A. Yes.

13 Q. Okay. When people talk about the Fifth
14 Amendment right not to testify, everybody agrees, you know,
15 we've grown up hearing about it, you know, the Fifth
16 Amendment. But sometimes people have different views when
17 it comes to these type of cases, okay, especially in
18 answering these Special Issues.

19 For example, you know, we've had some
20 jurors come in here and say, well, you know, if your client
21 doesn't get up there and testify, then that, in some way I'm
22 going to hold that against him, because if that was me, I'd
23 be up there, you know, arguing for my life. What do you
24 think about that?

25 A. I don't think that's what the law says.

1 Q. Okay. What do you think?

2 A. I think a person doesn't have to testify.

3 Q. Okay. And that's the way it is. That's the
4 way the law tells us that you are not supposed to allude to
5 it in any way or consider it in any part of your
6 deliberations.

7 But we have some people sometimes that
8 say, well, you know, I understand the Fifth Amendment right
9 applies during the guilt/innocence stage, you know, while
10 they're trying to prove whether he's guilty or not of
11 capital murder. But once we get to the punishment stage,
12 well, you know, things may change.

13 For example, Special Issue No. 2, I know
14 you've looked at it a couple of times already, but here, you
15 know, the jury is trying to determine whether the person who
16 is on trial actually anticipated whether, anticipated that a
17 human life would be taken. And what you're asked to do is,
18 like Mr. Shook said, is get in somebody's mind and figure
19 out what they were thinking. Do you agree with me?

20 A. That's how I understood it.

21 Q. And, you know, there are some people that
22 believe, well, you know, at this point I would require that
23 Mr. Murphy get on the stand and tell me exactly what he was
24 thinking for me to answer that in his favor. What do you
25 think about that?

1 A. That would be up to him and his attorneys.

2 Q. Okay. And, but, what I need to know from you
3 is, you know, would you need that to happen? Would you
4 require that somebody get up there and tell you what they
5 were --

6 A. No.

7 Q. -- actually anticipating?

8 A. No.

9 Q. You would ask the State to prove that to you
10 and if they couldn't, then you would answer it no?

11 A. That's correct.

12 Q. Okay. All right. Also, when it comes to the
13 punishment issues, sometimes we've had jurors, and we
14 actually had a juror, I think today, tell us that before she
15 could answer any of those questions in favor of Mr. Murphy,
16 she would have to hear some evidence from us.

17 And, as you know, the law is, you know,
18 we're not required to do anything, as Mr. Shook has
19 explained to you. But -- and she understood that, but she
20 would still want that and would hold it against us somehow
21 if that didn't happen. What do you think about somebody
22 like that?

23 A. I don't think that's the right way to look at
24 it and that's not how the law has been explained.

25 Q. And do you agree with that law?

1 A. Yes.

2 Q. Okay. You've told Mr. Shook that, you know,
3 you agree with the fact that an accomplice could be
4 convicted for capital murder and potentially face the death
5 penalty. And you thought that was a good law to have, is
6 that what you said?

7 A. I think maybe I said it was a fair law.

8 Q. It was a fair law. What do you think about
9 that? What kind of factors would be important to you in
10 deciding that somebody is guilty as an accomplice to capital
11 murder? They've given you some examples, but what would be
12 an important factor to you?

13 A. The crime they are involved in, the extent to
14 which they're involved in it, any prior knowledge of the
15 other person and their habits.

16 Q. Okay. Would intent mean anything to you, what
17 that person's intent was?

18 A. Which person?

19 Q. The accomplice that's on trial.

20 A. Yes.

21 Q. Okay. And in what way would that be important
22 to you?

23 A. I think it would be very important to know
24 what their intent was.

25 Q. Okay. If that person had no intent that

1 someone die, would that mean something to you?

2 A. If that could be proven, sure.

3 Q. And who would you require to prove that to
4 you?

5 A. Oh, the guilt has to be proven by the
6 prosecuting attorney.

7 Q. Okay. The law requires, obviously, that the
8 State prove that that person had some form of intent, right?

9 A. Correct.

10 Q. Would you require them to prove that the
11 intent was there or would you have them somehow prove -- I
12 mean, I was getting a little confused. How about somehow
13 prove that there was no intent?

14 A. I think they would have to prove there was
15 intent.

16 Q. Okay. And if they didn't, then you would find
17 it as no intent?

18 A. Right.

19 Q. Okay.

20 MR. SHOOK: Judge, if he, if the defense
21 attorney is explaining the law that we have to prove intent
22 in the guilt/innocence stage under the law of conspiracy,
23 then we object, since that person doesn't have intent. It's
24 that they should have anticipated.

25 THE COURT: Sustained.

1 Q. (By Mr. Sanchez) What I was talking about was
2 intentional behavior, doing something intentionally. You
3 know, someone can't do something by accident and be guilty
4 of it. You have to intend to do something for you to be
5 guilty of a crime. That's what I was talking about, not so
6 much as accomplices were involved or conspiracies. Can I
7 have a moment?

8 Really, what the bottom line is on
9 speaking to jurors here in these cases is that, you know, we
10 need somebody who's going to be right down the middle and
11 hold the State to their burden. And we're going to need a
12 juror that can get up there, sit in that box, and make the
13 State prove the case to them, and not give them any help.

14 This case has had a lot of media
15 attention. The social climate sometimes concerning these
16 cases affects people. And, you know, you need to tell us
17 and the Court that you're the type of juror that if the
18 State didn't prove their case to you beyond a reasonable
19 doubt, that you would be able to take pen in hand and write
20 a verdict of not guilty on a document that would lead to him
21 being freed of this charge. Are you the kind of person that
22 can do that?

23 A. Yes.

24 Q. Okay. Also, if you were to find someone
25 guilty, we need to find or have jurors, and you should have

1 to tell the Court that you'd be the type of person that if
2 you didn't feel he was a continuing threat to society, could
3 actually write no as an answer to Special Issue No. 1. Are
4 you the type of person that can do that?

5 A. Yes, sir.

6 Q. Okay. And the reason I ask that is because
7 sometimes people, there's outside influences, what people
8 say, what people, you have learned through the media and
9 things like that, that would maybe keep them from doing
10 that. They wouldn't feel right, even though the case wasn't
11 proven to them beyond a reasonable doubt.

12 So, what I need to hear from you is, are
13 you the type of person, also, that on Special Issue No. 3,
14 once you've gotten that far in the process, could really
15 give Special Issue No. 3 consideration? And if you felt
16 there was something in the case or about the person that was
17 mitigating enough, that you could actually answer that
18 question as yes and spare the death penalty for that person.
19 Can you do that?

20 A. Yes, sir.

21 Q. And you wouldn't have any problems explaining
22 yourself to anybody outside the courtroom about it or any
23 concerns about having to explain your actions?

24 A. No, sir.

25 MR. SANCHEZ: That's all I have, Your

1 Honor.

2 THE COURT: Thank you, sir. Mr. Walker,
3 if you would, please wait for us outside and I'll have you
4 back in just a few moments.

5 [Prospective juror out]

6 THE COURT: What says the State?

7 MR. SHOOK: We have no challenges for
8 cause.

9 MR. SANCHEZ: We have no challenge for
10 cause.

11 THE COURT: Do you want to step in your
12 office?

13 (Recess)

14 THE COURT: What says the State of Mr.
15 Walker?

16 MR. WIRSKYE: We'll accept.

17 MR. SANCHEZ: We'll accept the juror,
18 Your Honor.

19 THE COURT: Invite Mr. Walker back in,
20 please.

21 [Prospective juror in]

22 THE COURT: Mr. Walker, thank you for
23 giving us a minute. We have answered the two questions and
24 I inform you that you shall be placed on this jury.

25 PROSPECTIVE JUROR: That's a sobering

1 thought.

2 THE COURT: A sobering thought. Now
3 comes the hard part. When you go back to the office and
4 they probably know where you are, don't they?

5 PROSPECTIVE JUROR: Yes.

6 THE COURT: You go back to the office and
7 say, well, I'm going to be on this jury. What are they
8 doing to do? They're going to talk to you about it and
9 they're going to share their opinions with you. And the
10 lawyers are satisfied with your opinions, no one else's. So
11 I know you have to arrange it. That's why we're doing this
12 far enough out in advance so that you can arrange your
13 schedule accordingly.

14 You're a professional. You will need to
15 be able to use this phone here during the trial. It's no
16 problem. You won't be sequestered at night. We work normal
17 business hours. I think that you have seen when I say we
18 start at 1:30, you were in the chair at 1:30.

19 I can promise you I will not waste your
20 time. In fact, I've been told by jurors, Judge, please give
21 us a break. You're working us too hard. So I try to
22 balance everybody's needs the best we can. But it's
23 extremely important.

24 Now, I'm going to give you a written
25 instruction form and ask you to go over that with the

1 Sheriff, as well as a supplemental contact information
2 sheet. As you can tell, I'm a computer geek and I
3 understand that. I make notes the whole time through this
4 trial and the information that you provide on the
5 questionnaire is stored digitally in my computer.

6 The only way that anyone outside this
7 courtroom -- the attorneys and myself are the only ones that
8 have access to this information. The only way that this
9 information will be released is by a written court order
10 from the Court of Criminal Appeals in Austin. Short of
11 that, it's not leaving my control. I can assure you that.

12 Now, once again, you have to tell your
13 office you're going to be on jury duty, block out two weeks
14 for me November 10th, and don't talk about it any further.
15 After the trial is over, you can talk all you want about it.
16 But before and during the trial, you've got a gag order.

17 PROSPECTIVE JUROR: Okay.

18 THE COURT: Like I said, we'll do the
19 best we can on allowing you to make phone calls on morning
20 breaks and we'll have lunch breaks for you, so you won't be
21 shut down. The only time you may be sequestered, that means
22 staying in a hotel overnight, would be during deliberations.

23 After the jury has received the charge
24 from the Court, which is the written jury instructions, and
25 the attorneys have argued, the jury goes back to deliberate.

1 At that point they cannot separate. So if it takes you, you
2 know, half a day, one day, two days, or like California,
3 four months, we'll wait.

4 So that people like to know that you will
5 not be sequestered, provided the jury can follow my rules.
6 And that hasn't been a problem in the last 15 years that I
7 know of, so I don't anticipate it being an issue. Now, do
8 you have any questions of me?

9 PROSPECTIVE JUROR: No, sir.

10 THE COURT: You will think of them as
11 soon as you walk out the door.

12 PROSPECTIVE JUROR: I'm sure.

13 THE COURT: The Sheriff will be visiting
14 with you here in the back for a few minutes. Now, we will
15 be getting back together at some point when I have this jury
16 complete. I can't tell you what day that will be. But I
17 will be issuing a notice for you to reappear for a one to
18 one and a half hour morning session prior to the 10th of
19 November.

20 I don't know what day that will be. I
21 will try to do it a week ahead of time, but it all depends
22 on when I get this jury completed. The reason I do that is
23 there are certain things that I cannot go through until I
24 have everybody here. We'll be getting a lot of information
25 out of the way this afternoon, but I can't get it all done

1 until I have everybody in the box.

2 So for your planning schedule, two weeks
3 beginning November 10th, you will have that in writing. She
4 will give it to you later. Two weeks, November 10th, and
5 you will get another letter from me for another court
6 appearance prior to that. Fair enough?

7 PROSPECTIVE JUROR: Yes, sir.

8 THE COURT: Any questions, you can ask
9 her today, I can try to answer along with the parties, but
10 after today I can't talk to you.

11 PROSPECTIVE JUROR: Okay.

12 THE COURT: We have that appearance of
13 impropriety. It's kind of like the certain public figures
14 in the newspaper, it just looks bad if you see it. So if
15 you see me in the hallway in the back, I'm not going to talk
16 to you. I'm not going to say good morning, I'm not going to
17 say hello, how are you, the weather is nice. I'm not going
18 to say anything. I'm going to be rude.

19 The reason for that is the appearance of
20 impropriety, because if somebody is observing us from a
21 distance, they don't know what we're talking about. That's
22 the Sheriff. That's her job. She's supposed to take care
23 of the jury. She can answer some questions, some she
24 cannot. So that's the rule.

25 You, I mean, I'm real, real strict about

1 that, because I don't want anybody to say that Judge
2 Cunningham was improper. That's just not going to happen.
3 So I want you to understand, going in, that I'm going to be
4 rude. So will the lawyers when they see you, they just
5 can't have any contact with you.

6 The idea is that everything that you will
7 make your decision on will come from that witness stand and
8 that witness stand alone. No media, no Internet no friends,
9 anything. Fair enough?

10 PROSPECTIVE JUROR: Yes, sir.

11 THE COURT: If you would, retire to the
12 jury room with the Sheriff and she'll go through some more
13 documents with you. Thank you, Mr. Walker.

14 [Prospective juror out]

15 THE COURT: Sandra G. Barron.

16 [Prospective juror in]

17 THE COURT: Good afternoon.

18 PROSPECTIVE JUROR: Hi.

19 THE COURT: We have juror No. 3092,
20 Sandra G. Barron; is that pronounced correctly?

21 PROSPECTIVE JUROR: That's right.

22 THE COURT: Good afternoon, Ms. Barron.
23 Sorry to keep you waiting. We start at 1:30 and we catch
24 the first one in the door and go from there. We have to
25 balance, we don't know if we'll talk to someone for just a

1 few minutes or an hour and a half, so I have to balance 15
2 people waiting or one or two people waiting. So I apologize
3 for the delay.

4 PROSPECTIVE JUROR: Okay.

5 THE COURT: Obviously, you had enough
6 time to read the guide that I provided for you?

7 PROSPECTIVE JUROR: Yes.

8 THE COURT: And hopefully you reviewed
9 your questionnaire that you filled out for us in May?

10 PROSPECTIVE JUROR: Yes.

11 THE COURT: I know it can be complicated
12 and this is the opportunity for the attorneys to visit with
13 you and bring you up to speed and help you understand how
14 all this law relates to the particular case at hand. And
15 the bottom line is there are no wrong answers.

16 PROSPECTIVE JUROR: Okay.

17 THE COURT: People come in a little
18 nervous sometimes. And try to relax and just tell them
19 what's on your mind, give your honest opinions. Only
20 question I have for you at this point is will you be able to
21 serve the Court for a period of two weeks beginning on
22 November 10th?

23 PROSPECTIVE JUROR: I don't know why I
24 shouldn't. I did just start a new job and that is my only
25 concern.

1 THE COURT: And work is always a concern
2 and it's one of those things like paying taxes, nobody wants
3 to do it, and it's just one of those things we have to do
4 sometimes. We will be able to use the phone during the day,
5 so you will be able to at least keep up with your office, if
6 you need to be able to contact them. We do work normal
7 business hours. So if you had to run by in the afternoon to
8 kind of pick up the pieces, if you will, you would have time
9 to do that.

10 So the only questions I have to answer at
11 the end of the process would be, number one, do you
12 understand the law? And, number two, can you follow the
13 law? That's the big picture I'm looking for this afternoon.
14 So that's what the attorneys will help you with. At this
15 time I will turn it over to Mr. Wirskye.

16 MR. WIRSKYE: May it please the Court?

17 SANDRA BARRON,
18 having been duly sworn, was examined and testified as
19 follows:

20 DIRECT EXAMINATION

21 BY MR. WIRSKYE:

22 Q. Ms. Barron, how are you this afternoon?

23 A. Fine.

24 Q. Okay. My name is Bill Wirskye and I'll be the
25 Assistant District Attorney that will be visiting with you

1 for the next few minutes. I appreciate your patience as the
2 afternoon has kind of drug on.

3 What I'd like to do is follow up on some
4 of the information in your questionnaire with you, talk to
5 you a little bit about your thoughts and feelings on the
6 death penalty, how you might feel if you were selected to be
7 on a death penalty jury, then maybe talk a little bit about
8 some of the laws and rules that apply in a criminal case
9 and, most particularly, a death penalty case such as this.

10 You said you just started a new job?

11 A. Yes.

12 Q. Where are you working?

13 A. It's for a company called Extria (phonetic)
14 and it's in Richardson.

15 Q. And I know you were in the field of technical
16 writing?

17 A. Yes.

18 Q. What are you doing for them?

19 A. I'm doing the same thing, online help and
20 documents for computer systems.

21 Q. Okay. We had a technical writer in here I
22 guess last week, and he found three or four errors in all
23 our paperwork. I think when we get around to looking at
24 that big board over on the wall you may find a few
25 misspellings and a few things like that. How long have you

1 been working there?

2 A. Since July 7.

3 Q. Okay. And what type of hardship do you think
4 it would be for you? Obviously, it's not a legal excuse
5 but, you know, the parties need to know kind of what is
6 going on with everybody.

7 A. I would be able if -- I'm sure I could work in
8 the evenings and catch up. I am the only person that does
9 that type of job there, so -- but my employer didn't seem to
10 have any problems or have any extra questions about, you
11 know, my coming here today.

12 Q. Okay. You know, legally we can't excuse you,
13 just because it's a hardship. It's, I guess, a hardship to
14 everybody. Sometimes we tell us, or people tell us, that
15 whatever they have going on in their professional or
16 personal life is so pressing to them or would be, I guess,
17 to the forefront of their mind so much, they express a
18 concern about, you know, being able to listen to all the
19 evidence and give the trial their full attention.

20 And if they feel that way, that's fine.
21 We understand. It's just, obviously, something we need to
22 know. And how do you think it might affect you?

23 A. Oh, I don't think it would be -- it'd be a
24 distraction.

25 Q. Okay. Fair enough. You were kind enough to

1 fill out this long questionnaire for us. You know, we ask
2 just about everything we can think of. One of the things
3 that I always find fascinating and I don't know if it's
4 really helpful, but on page 15, if you want to follow along,
5 we asked you to kind of list publicly known people you most
6 and least respect.

7 And you had two names on there for women
8 you most respect. And I think I recognize the names, but
9 I'm not sure exactly how I recognize them. And the first
10 was Sarah Weddington. Is that an attorney?

11 A. Yes, from Austin.

12 Q. That's what I thought. Tell me why you
13 respect her.

14 A. Sarah Weddington, Rowe vs Wade.

15 Q. Okay. That's where I've heard it. Okay. And
16 the one after that, I guess?

17 A. Veletta Lill.

18 Q. Who is that?

19 A. Okay. Who is your city council
20 representative?

21 Q. That's a good question.

22 A. No, I might not have spelled her name
23 correctly, so you might not have recognized it because of
24 that.

25 Q. In all fairness, I don't live in the city of

1 Dallas.

2 A. Okay.

3 Q. Okay. Fair enough. Let's talk a little bit
4 about the death penalty. I know we asked you on that first
5 page if you were in favor of the death penalty and you
6 marked yes, but you kind of acted like you weren't one
7 hundred percent sure. You said, I'm not sure I favor the
8 death penalty over other types of punishment. Explain to me
9 kind of what is going on with your thoughts and feelings
10 about the death penalty.

11 A. I don't know that I think it's a better type
12 of punishment than life in prison. But I think that it can
13 certainly be considered. I don't know how if, are you in
14 favor of anything like that, I don't know. I guess I think
15 of it in my own terms, no, I don't want to die, and no, I
16 don't want to go to prison.

17 Q. Do you think that you could consider it as a
18 possible punishment for another human being?

19 A. Yes.

20 Q. Okay. Why do you feel that way, that you
21 could consider that type of punishment?

22 A. I think for cases there is times that that's,
23 that's a fair, or, penalty. I know it's -- the State of
24 Texas recognizes it. I don't, you know, I don't know that
25 it's -- I don't come in here thinking that everybody should

1 be put to death. But I don't come in here thinking that no
2 one should be.

3 Q. Uh-huh. You know, we have some people that
4 tell us, you know, if it's the law in the State of Texas, I
5 could follow the law. And I think personally they're very
6 conflicted inside.

7 A. Oh, I see. So you're trying to figure out if
8 I -- no, I could give someone the death penalty.

9 Q. Okay. When you talked about certain types of
10 cases, what comes to mind? What type of case comes to mind
11 for you?

12 A. Well, certainly a murder and a violent crime.

13 Q. I know you put in your questionnaire, I think
14 maybe rape, maybe certain rape cases?

15 A. Right. I think those are crimes of violence.

16 Q. Okay. In Texas, as you probably got a chance
17 to read in the packet, we reserve the death penalty for
18 consideration just in murder cases and then only a certain
19 subset or certain type of murder case.

20 Murder of a police officer, fireman on
21 duty, murder in the course of another crime like burglary,
22 robbery, rape, mass murder, serial murder, murder of a child
23 under six, that type thing. Is that a list that's pretty
24 much in accord with your feelings about the type crimes that
25 should be considered?

1 A. Yes.

2 Q. Okay. Is there any case that you may have
3 followed in the media, heard about, read about, seen on TV,
4 that comes to mind and you think, you know, gee, that person
5 deserved the death penalty, or that's a worthy candidate for
6 the death penalty?

7 A. I don't keep up with the news as I should.
8 And I can't think of any of the names. But I think anywhere
9 a child was killed or -- I'm sorry, I just can't think of
10 any.

11 Q. Okay. I notice on, I think it was on maybe
12 page 3, you know, we asked you a couple of questions about
13 do you have any moral, religious, or personal beliefs that
14 would prevent you sitting in judgment of another human being
15 and you marked no. And you said, I know it will not be
16 easy, but I can do it. Is that something you are really
17 comfortable with? Kind of --

18 A. Well, that's how I feel. I don't think you
19 could make that decision very easily without -- you'd have
20 to have some consideration and -- and you are taking
21 somebody else's life. I mean, I -- but that's just about
22 how I feel. It's not easy.

23 Q. Okay. And we asked you the best argument in
24 support of the death penalty is. And, basically, what you
25 wrote, I think, you know, an eye for an eye type idea. And

1 I was just curious if that's something you subscribe to, the
2 eye for an eye philosophy?

3 A. I don't think it's always equal. I mean, not
4 everyone who murders somebody should be put to death. But I
5 suppose I do subscribe to it. I wrote it down.

6 Q. Okay. And, you know, we asked the best
7 argument against the death penalty and you put it is
8 inhumane. Is that something you personally subscribe to,
9 that idea of the death penalty or at least the process or
10 how we do it is inhumane?

11 A. Well, it is inhumane, but sometimes it's
12 deserved.

13 Q. Okay. I guess, to be more specific, what
14 particular aspect of it do you believe would be inhumane?

15 A. Well, no one wants to die early. No one wants
16 to. I've -- I don't know. It's not something you do every
17 day. It's not --

18 Q. Okay. Finally, we asked people to kind of
19 rank themselves on a scale of 1 to 10 kind of where they
20 come down on the death penalty, 10 being the most and 1
21 being the least. And I think you gave yourself an 8.

22 A. Eight.

23 Q. And I know that means different things to
24 different people, but I was kind of curious because I sense
25 some hesitation in the questionnaire and in talking with

1 you, but 8 is kind of towards the high end of the scale. I
2 was just curious what that 8 meant to you?

3 A. Well, it didn't mean a perfect 10. But I do
4 think that there's times that the death penalty is fair.

5 Q. Okay.

6 A. Or deserved.

7 Q. Let me kind of follow up and take it kind of
8 down to the next level of analysis, because we talk to so
9 many people, and, as you can imagine, we have the entire
10 spectrum of beliefs on the death penalty. People that never
11 believe in it, people that believe in it too strongly, and,
12 of course, those ends of the extreme wouldn't be fair and
13 wouldn't be the right juror for a case.

14 But we always ask people how they feel
15 about this aspect of the law. You know, oftentimes crimes
16 are committed by more than just one person, whether it be
17 something from a shoplift all the way up to a capital
18 murder. And the law says that we can prosecute every
19 individual that's actively participating in a crime.

20 And when you're talking about that in the
21 context of capital murder, you may have a situation where
22 you just have one person who actually pulled the trigger,
23 who caused the death. We'll call them the triggerman for
24 lack of a better word.

25 You may have other people, other

1 accomplices, is the word we typically use, who are actively
2 involved in a crime, but didn't actually cause the death,
3 didn't actually pull the trigger, the nontriggermen.

4 And some people we talk to, you know,
5 they may be in favor of the death penalty for that person
6 that pulled the trigger. They believe it would be justified
7 in that case for whatever reason. Usually because that
8 person has taken a life, they consider it might be a just
9 punishment to take theirs.

10 But they tend to draw a line sometimes
11 and they say with respect to the accomplices, the
12 nontriggermen, you know, I may want to punish them and hold
13 them accountable and give them a life sentence, but I just
14 don't believe in my heart of hearts that the death penalty
15 is appropriate or justified for those accomplices, because
16 they didn't actually take a life, that type thing. How do
17 you see that issue?

18 A. I think you'd have to ask, did the person who
19 didn't shoot the gun, would he have done it if he had the
20 opportunity? Um, and I guess that's a question I'd ask.

21 Q. Okay. Let me kind of explain what the law is
22 to you to make sure because, you know, the worst fear on
23 both sides is that we put somebody over in the jury box and
24 we try to put them in -- we put them in a hard position. We
25 didn't want them to violate any moral or any matter of

1 conscience for them. So that's why we go into detail on
2 certain aspects of the law.

3 What the law is, is this, and I'll just
4 give you an example to kind of illustrate it. Let's say Mr.
5 Shook and I, the other prosecutor, decide we're going to rob
6 a bank. We get together and agree and plan that he's going
7 to take the pistol in. He's going to hold up the tellers.
8 And while he does that, I'm going to come in with a bag and
9 kind of clean out the cash drawers.

10 And that's the plan we make. No one is
11 supposed to get hurt. And we go in to do that bank robbery.
12 And as he's holding those tellers at bay with the pistol,
13 for whatever reason, maybe one of them looks at him funny or
14 we see one of them going for a silent alarm to summon the
15 police, he shoots and kills, intentionally shoots and kills
16 one of those tellers.

17 Now, obviously, he's committed an
18 intentional murder in the course of a robbery. He could be
19 convicted of capital murder and potentially face the death
20 penalty. The law says, depending on the facts and
21 circumstances, that I could, too. Whether, even if I didn't
22 have any intent that somebody get killed, even if I was
23 unarmed. I'm just curious what you think about that aspect
24 of the law?

25 A. Then I would say you could get the death

1 penalty, too. I mean, I wouldn't have any trouble if
2 somebody ended up dead in all that and you helped plan it.
3 I would think that probably y'all didn't have a big
4 discussion about who would die and who wouldn't.

5 Q. I mean, that was the plan. We were -- you
6 know, I just signed up for a bank robbery, you know. I had
7 no intent anyone could get hurt. In fact, I could have
8 stood there and said, you know, Mr. Shook, don't shoot them,
9 and he could have shot them anyway and killed them. But the
10 law says, depending on the facts and circumstances, I could
11 still be subject to the death penalty.

12 And that's where a lot of those people
13 draw the line, because I think, to them, and maybe such as
14 yourself, that intent is very important.

15 A. Uh-huh.

16 Q. You know, if the accomplice had the intent
17 that a capital murder happen or somebody would die, they see
18 that as a very clear case where the accomplice could get the
19 death penalty.

20 But I think, again, a lot of people draw
21 that line with the accomplice's intent. And I think where
22 some people have moral objections to it is the situation
23 where the accomplice didn't have the intent that someone
24 die. And I'm just curious what you think about that
25 particular situation?

1 A. Well, if he just happened to be there, I
2 guess, and, but, I don't know, I think that he would -- the
3 death penalty, if the law says it can be considered, then it
4 needs to be considered. Could I tell you how I'd vote? And
5 I don't know.

6 Q. And, obviously, you know, we can't get into
7 the facts of this case and we can't ask you how you'd vote
8 in this case. Again, we just want to make sure that, you
9 know, the people we get on the jury box, we don't ask them
10 to violate their conscience. We don't want them to hold a
11 belief that would somehow impair them from being able to
12 follow the law that applies in the case as a matter of
13 simple fairness for both sides.

14 And to be very frank with you, the reason
15 I go into it is we are prosecuting this case under that
16 theory of accomplice liability, that Mr. Murphy was an
17 accomplice in this case. And that's why we spend so much
18 time. And we know these are not matters that most people
19 think about routinely. You probably never considered this
20 issue, until just a few minutes ago.

21 And that's why I want to give you enough
22 time to really think it through, because once you get over
23 there in that jury box, it's too late. This is the time to
24 kind of work through those kind of meddlesome issues and
25 make sure that you, I guess, agree with the law, especially

1 under that scenario where the accomplice didn't have any
2 intent.

3 A. Um, I agree with it, I mean, I can see both
4 sides. I can see that if you're plotting to just, you just
5 want some money, you didn't want to kill anybody. And you
6 guys go in, then maybe you shouldn't be responsible. But,
7 by the same token, you were there and you agreed to do this.
8 You knew it would be a crime. I mean, you must have
9 considered the risks or you wouldn't have taken a gun or
10 your friend wouldn't have taken a gun.

11 Q. Uh-huh. How would you personally feel about
12 being involved in a case where that is the situation, where
13 an accomplice is possibly facing the death penalty?

14 A. Well, it's not something a person looks
15 forward to.

16 Q. Sure.

17 A. But I think I could be a fair-minded person.
18 And I think I could consider the evidence.

19 Q. Okay.

20 A. I didn't look forward to being on the rape
21 trial, but I think I was fair on that.

22 Q. Okay. I want to visit with you about that in
23 just a minute. But just to kind of wrap up our discussion
24 about accomplices. What the law is, is if a jury finds
25 that, even though I didn't have any intent that someone die,

1 if the jury feels that I should have anticipated that a life
2 could be taken, then I could be convicted as an accomplice
3 and potentially face the death penalty. Does that make
4 sense to you?

5 A. So you're saying that the person should have
6 known that he would be in a situation -- I'm sorry, I guess
7 I was thinking about something else.

8 Q. Going back to our example. If the jury feels
9 that, you know, even though I didn't have any intent for
10 Mr. Shook to shoot and kill someone and commit a capital
11 murder, if the jury thinks that I should have anticipated
12 that a life could be taken during that bank robbery, then
13 they could convict me of capital murder and I could face the
14 death penalty.

15 A. Oh, so if the jury thinks that you should have
16 anticipated that, then the jury can convict you. Um, that
17 makes sense.

18 Q. Why do you think that makes sense?

19 A. Well, you should know what you're walking
20 into. And you should know things don't always play out the
21 way you think they will.

22 Q. Do you think, knowing in your heart of hearts
23 how you feel about the situation, that you could ever assess
24 the death penalty for an accomplice that didn't have that
25 intent, depending on the facts and circumstances?

1 A. I think I could assess a death penalty.

2 Otherwise, I wouldn't have said that.

3 Q. Okay. Fair enough. Let's talk a little bit
4 about, you mentioned you were on a rape trial. And when was
5 that?

6 A. It was about 1989.

7 Q. Okay. It looked like there were a couple of
8 different cases or a couple of different counts; is that
9 right?

10 A. He was charged with three counts of rape.

11 Q. Do you remember the facts of that case?

12 A. Yes. Um, the defendant would go to apartment
13 complexes and find the cute girls who were showing
14 apartments and say, gee, I want to rent an apartment. And
15 then, this was when, of course, it had happened years before
16 it ever came. And so they weren't very careful about
17 getting the names of people that they took up to the
18 apartments. And then he would put, get somebody in a
19 compromised, you know, he'd corner them somehow, and rape
20 them in the vacant apartment and leave.

21 Q. Did the person use a weapon?

22 A. No.

23 Q. Okay. From what you remember, do you feel, I
24 think they found him guilty; is that right? On all the
25 charges?

1 A. Yes.

2 Q. Was the evidence pretty straightforward in
3 your opinion that he was guilty?

4 A. Yes. It was pretty straightforward.

5 Q. Okay. And I think you were also called upon
6 in those cases to set the punishment --

7 A. Yes.

8 Q. -- for the person. Do you remember what that
9 person got?

10 A. Yes. Because that was the biggest part of the
11 discussion. There were three counts. And on the first
12 count we gave him 55 years, on the second count 65, and the
13 third count 75.

14 Q. Okay. How did y'all arrive at that?

15 A. Because two people thought that he should get
16 probation because -- or he should have some sort of feeling
17 that he could get out of jail at some point, I don't know.

18 Q. It sounds like you weren't one of those
19 people.

20 A. I was not one of those people.

21 Q. Okay.

22 A. So, anyway, there were other people that
23 thought it should be life. So we decided at 8:00 at night,
24 55, 65, and 75.

25 Q. Did the person charged testify in that case,

1 do you remember?

2 A. No.

3 Q. Okay. When you got to the second part of the
4 trial, the punishment phase, did you -- were any prior
5 convictions or criminal history, were they introduced or
6 anything like that?

7 A. I don't know if that came out during the
8 punishment phase. After it was over they did tell us that
9 he was charged in Denton County with the same thing. But I
10 don't think that came up during the trial, but --

11 Q. Okay. Having had that experience, how has
12 that kind of shaped your views about the criminal justice
13 system, serving on that type of case?

14 A. Well, you meet all kinds. Twelve people can
15 certainly have different opinions after they hear the same
16 story.

17 Q. It sounds like if it were up to you, you might
18 have given him more time, or --

19 A. Yes, but I was satisfied. I agreed.

20 Q. Okay. I assume going into that case, you knew
21 nothing of what you were getting yourself into?

22 A. No.

23 Q. Okay. Let me follow up on this case because
24 you, like everybody we've talked to, has indicated they've
25 heard something about this case --

1 A. Yes.

2 Q. -- which is a little unusual. You know, in
3 your case everybody went in with a clean slate, not knowing
4 anything. In this case, you know, almost everybody we
5 talked to knows something. Some know a lot, some don't know
6 much, some have done some research, some haven't. And it
7 affects different people differently. But, tell us what you
8 know about this case.

9 A. Well, I don't read every article in the
10 newspaper. But I know Aubrey Hawkins was killed by the
11 Texas Seven, I think they were called. And it was at
12 Oshman's in Irving. And then they were -- nobody could find
13 them until they were up in Colorado. And I believe that the
14 other defendants have received the death penalty.

15 But I will tell you, I know that because
16 that's what my father said to me, not because -- and I have
17 been wondering if that's true, but I don't really know. And
18 I haven't -- I just haven't taken the time to find out.

19 Q. I guess typically people share with their
20 loved ones what they're coming down for, jury duty, and it
21 sounds like you got in that discussion with your dad; is
22 that right?

23 A. Yeah, I mean --

24 THE COURT: Ms. Barron, if you would,
25 could you give us a minute and wait for us outside and we'll

1 have you right back, okay? We need to take a quick break.

2 PROSPECTIVE JUROR: Pardon me? You want
3 me to leave?

4 THE COURT: Yes, ma'am.

5 PROSPECTIVE JUROR: Okay.

6 THE COURT: We need to take a quick
7 break. If you would, I need you to wait outside.

8 [Prospective juror out]

9 THE COURT: Let the record reflect the
10 potential juror Sandra G. Barron is excused. I need to make
11 a disclosure to the parties in this matter. I didn't
12 realize who it was. I haven't seen her in probably 20
13 years. Her mother and father are family friends and her
14 mother actually had a fundraiser party for me at -- in their
15 neighborhood.

16 I believe, if I recall correctly, that my
17 father and mother were 50-year friends of her parents. And
18 then when her -- she said her dad, then it all snapped
19 together. She probably doesn't remember who I am and I was
20 not going to make that disclosure. But I didn't want to sit
21 here after I realized who she was.

22 MS. BUSBEE: You scared her.

23 THE COURT: As soon as she said her dad
24 and her dad's name is Dale, I think.

25 MS. BUSBEE: Well, I don't see any

1 reason, if she doesn't recognize it, to go into it, do you?

2 THE COURT: I just wanted to put that out
3 there so --

4 MR. WIRSKYE: If I can inquire of the
5 Court, does the Court recall having any conversation with
6 Ms. Barron's father about these cases?

7 THE COURT: Oh, no. I haven't -- I
8 haven't seen her mother -- her mother is Patricia. I
9 haven't seen Patricia for probably two years. And it was at
10 a Republican deal. But they did have a fundraiser for me.
11 So, I mean, that's just --

12 MS. BUSBEE: Well, but you're a neutral
13 party in this issue.

14 THE COURT: I am. I just, I just didn't
15 want it to come back later and say, well, you know,
16 Cunningham put a ringer on the jury.

17 MS. BUSBEE: Oh, no, no, no, no, no.

18 THE COURT: I'm just making the
19 disclosure. You can do with it what you will.

20 MS. BUSBEE: We appreciate that, Your
21 Honor. Thank you. We thought maybe it was the banging over
22 here.

23 THE COURT: No, I didn't hear that. I
24 was looking at her and listening to the voice and she's my
25 brother's age. And I've been in their home and that type of

1 deal, but it's been a while. And then I realized that she
2 has never married, so.

3 MS. BUSBEE: That's suspicious. I'm just
4 kidding.

5 THE COURT: So that's why I wanted to
6 make the disclosure. So if you would, invite Ms. Barron
7 back in, please.

8 [Prospective juror in]

9 THE COURT: I'm sorry for the
10 interruption.

11 PROSPECTIVE JUROR: That's okay.

12 MR. WIRSKYE: May I proceed?

13 THE COURT: Yes, sir.

14 Q. (By Mr. Wirskye) Okay. Ms. Barron, I want to
15 assure you that you didn't do anything wrong to cause that
16 delay. More importantly, I want to assure you I didn't do
17 anything wrong. Judge Cunningham, who it turns out you may
18 have heard of or may know, or have met, in keeping with the
19 legal procedure, I think realized that he probably, his
20 parents know your parents, and they may have had a
21 fundraiser for him, and --

22 A. Well, I don't -- I mean, yeah, I know you. I
23 know your dad's -- I think your dad's Bulldog or you're
24 Bulldog, one of you. Anyway --

25 Q. They both have a similar countenance.

1 A. Anyway, I don't remember any fundraisers or
2 anything. But, yeah, your name is familiar to me, but --

3 Q. I was just curious when you talked with your
4 dad, and did he mention that he knew whose court you were
5 coming down to or had had a fundraiser for Judge Cunningham?

6 A. Oh, no. He didn't mention fundraisers or
7 anything like that. But he just, he probably said, yeah,
8 you remember Bulldog Cunningham, excuse me, and I said, no,
9 Daddy, I don't remember, you know. But I'm not denying
10 that, I mean, I know the McKinneys live down the street from
11 us and my sister was a friend of Tammy McKinney, so.

12 Q. Okay. Well, as I said, different people have
13 different exposure in different ways to this case and it
14 affects people differently. But it sounds like you
15 obviously have a connection at least to the Court and have
16 heard about --

17 A. Probably, I know Judge Cunningham. I know
18 more about him than I would know somebody else, but --

19 Q. Well, we probably need to talk later, then.
20 But, I guess, you know, we always ask people to kind of look
21 in their heart of hearts. It sounds like you know some of
22 the details of the crime, the capture, and what's gone on in
23 some of the subsequent court cases.

24 You know, like I said, it is a very
25 unique deal. It's not like the last case you served on

1 where you start with that clean slate. And I think both
2 sides worry sometimes that jurors have too much knowledge
3 and they don't start with that clean slate. And I'm just
4 curious. How do you think that would affect you?

5 A. About what I know? I don't know. I don't
6 feel like I know as much as some of the other people that
7 really read the paper real closely. And I'm embarrassed to
8 admit that I don't read the paper that closely.

9 Q. Have you formed any opinions about what
10 happened?

11 A. Well, I mean, I --

12 Q. It's only natural to feel --

13 A. Yeah, I think he was killed when those seven
14 people robbed that store and I know they went to Colorado
15 and one of them committed suicide. And have I formed an
16 opinion? Well, he hasn't been tried. I mean, I'll try to
17 be fair about it. I'm not walking in saying he's guilty.

18 Q. Sure. And I think everybody, you know, wants
19 to think they can be fair. This case just is so kind of
20 unusual because of the amount of publicity and we have
21 jurors, such as yourself, that know about the facts and the
22 outcomes of the other trials and, you know, we just kind of
23 leave it up to you.

24 We know everybody wants to say they can
25 be fair and we admire that, but not everyone is a perfect

1 juror for a perfect type case. Obviously, in the rape case,
2 since you didn't know anything about it, it sounds like you
3 were a good juror from our perspective. But I'm just
4 concerned maybe that you're not the perfect juror for this
5 case, based on what you've heard. And only, you know, you
6 can tell us.

7 What the law says is that, you know, you
8 kind of have to put those opinions out of your mind and just
9 base your verdict on the facts that you hear in the
10 courtroom. And I think the concern from both sides is that,
11 you know, you may have heard something, read something,
12 gotten a snippet word of mouth from your father, and you'd
13 kind of, that would be in the back of your head and
14 potentially influence your verdict. How do you feel about
15 that?

16 A. Well, some things my father says are not in
17 the back of my head. But I think I could be honest. I
18 mean, I would walk in here with the idea the man is innocent
19 and listen to the evidence. Now, I don't know if I would be
20 a perfect juror or not.

21 Q. Okay. You know the law, sometimes we kind of
22 have to deal in absolutes and yes or no's, and sometimes I
23 think doesn't read real well, if somebody has to read the
24 record on down the line. But do you think you can base your
25 verdict in this case, knowing what you know, just based on

1 what you hear in the courtroom and not based in any way on
2 what you may have heard outside the courtroom?

3 A. Yes.

4 Q. Okay. Fair enough. Let's talk a little bit
5 about these Special Issues. These are what you get to, if
6 you found a person guilty of capital murder. The answers to
7 these three questions determine the appropriate sentence in
8 the case. We don't ask a juror to write in life sentence or
9 write in death sentence. We ask a juror to answer these
10 questions and let those answers determine the sentence.

11 If they are answered in such a way, well,
12 basically just kind of in a nutshell, we'll visit about them
13 more in a minute, but that first question asks if the person
14 would be a future continuing threat to society. If that's
15 answered yes, then you move to the second question which
16 asks, basically, it's kind of the accomplice situation, did
17 a person anticipate that a human life would be taken? If
18 that question is answered yes, then we move to the final
19 question which, basically, is mitigation.

20 Is there some reason in the facts of the
21 crime, the facts of the background of the person, the blame
22 he bears, that his life should be spared? And if that
23 question is answered no, then the Judge has no discretion
24 and the defendant will be sentenced to death. If the
25 questions are answered any other way, they're looking at a

1 life sentence. You look like --

2 A. So if all three are answered no, then the
3 death penalty is the result?

4 Q. If the first two are answered yes --

5 A. Oh, the first two, and last one is no?

6 Q. Yeah. If you think he's a future danger and
7 you think at the very least he anticipated that a life would
8 be taken, and the third one is answered no, there's nothing
9 mitigating, then a death sentence would result. If the
10 questions are answered any other way, then the person would
11 be sentenced to a life sentence, which are the only two
12 possible punishments for capital murders. Does that kind of
13 make sense to you?

14 A. Yes.

15 Q. Okay. Take a second and read those questions
16 again. I know you're a technical writer, so you'll probably
17 read for form and content, but --

18 A. Well, I'm not going to let you read everything
19 I've written either, so. You can find some type-o's in my
20 work.

21 Q. They're phrased a little bit differently than
22 they are in the packet and we can visit about them after you
23 read them.

24 A. Okay. I forgot your question, I'm sorry.

25 Q. Oh, I just wanted you to look at the questions

1 so we can talk about them. That first question asks, if
2 there is a probability that the defendant would commit
3 criminal acts of violence such that they'd be a continuing
4 threat to society.

5 Do you see how that question kind of asks
6 you to make a prediction about future behavior?

7 A. Right.

8 Q. Is that something you think you'd be
9 comfortable in doing?

10 A. Yes.

11 Q. Okay. To answer that question or make that
12 sort of prediction, is there some particular type evidence
13 that you would think you'd need to make that prediction?

14 A. Well, I mean, based on previous actions kind
15 of tells you what somebody is like.

16 Q. And that's what a lot of people tell us most
17 commonly, you know, that I guess the past is the best
18 indicator of the future. You know, a leopard doesn't change
19 his spots, that type of thing. Then you have that phrase,
20 "criminal acts of violence." What type of crimes or what
21 type of acts come to mind when you see that phrase?

22 A. Well, I mean, obviously, murder and,
23 obviously, the situation where they were in a, robbing a
24 store. Any other, um, I don't know, you could beat somebody
25 to death, I suppose, and take their car or something.

1 Q. Okay. Rape, the type of case you sat on.
2 What the law requires when we get to these Special Issues is
3 that a jury doesn't, I guess, automatically answer them
4 based on what they did in the first phase of the trial.

5 A lot of people tell us they'd have a
6 difficult time doing that, keeping that open mind. And they
7 tell us this, they say, you know, I know I'm supposed to
8 keep an open mind when I get to that first question, but,
9 you know, you are kind of asking me to go against common
10 sense because I just found the person guilty of capital
11 murder.

12 I think if I do that, then I'm probably
13 going to think they're a future danger. You know, I'm going
14 to already have that question answered, you know, just
15 because I found him guilty of capital murder. What do you
16 think about that?

17 A. Well, that would be difficult. I mean, if
18 somebody commits capital murder, it's pretty hard to say
19 that they wouldn't be violent.

20 Q. A lot of people feel that way. That's kind of
21 a common sense proposition. The law actually is that you
22 can't automatically answer that question, just based on
23 finding them guilty of capital murder.

24 That, very frankly, a lot of people tell
25 us they couldn't do that, that they couldn't keep that open

1 mind, that if they had found somebody guilty of capital
2 murder, that question is always going to be answered yes,
3 because they're always going to think a person capable of
4 capital murder is always going to have that probability that
5 he'd be a future danger to society.

6 A. I guess the only other option, I mean, the
7 argument is that the -- in those circumstances, if the
8 circumstances had been different, it might not have
9 happened. Therefore, if circumstances are different when
10 they're out of jail or when they're, you know, out in
11 society, might not be faced with the same circumstances;
12 therefore, it wouldn't happen.

13 Q. Okay. Run me through that again, I think I
14 lost you.

15 A. Well, I don't know. I guess I'm tired, too.
16 But I was just thinking that, yes, it's true, if you could
17 find somebody guilty of capital murder, you would -- it
18 would be easy to answer that first question that yes, they
19 are a danger to the -- only looking at it from the other
20 perspective, though, you could say, well, in those
21 circumstances that the murder was committed, that might have
22 been more the part of the probability and maybe in other
23 circumstances the person might not do it. I don't know.

24 Q. Now, I've had people tell me that, you know,
25 based on what they know about this case, because they've had

1 some background through the media, that that question is
2 always going to be answered yes for them.

3 You know, the combination, I guess, of
4 finding somebody guilty of capital murder and then what they
5 know about the case would just be too much and they'd answer
6 that question yes. It's kind of already answered for them,
7 if they find them guilty in this case. I see you shaking
8 your head, nodding along.

9 A. I mean, everything you say makes sense. If I
10 was chosen, if I was on the jury, I would hope that I would
11 have the open mind to say, to look at it differently.

12 Q. And, I mean, that's what the law contemplates,
13 very frankly, but a lot of people tell us they just can't do
14 it. If you can do it, fine. If you can't, fine, too. You
15 know, you can move along and we get you -- you get another
16 jury notice on down the line and probably be on another case
17 that you didn't know anything about and probably not a death
18 penalty case. But we just kind of leave it up to you
19 whether you can do that or not or whether it's too much a
20 matter of common sense.

21 A. Uh-huh. I think I could.

22 Q. Okay. Well, that question starts off with a
23 no answer. We've got to prove it to you that the answer
24 should be yes. If we do that, then you move on to the
25 second Special Issue. And this kind of deals with what

1 we've already talked about where there's an accomplice. In
2 order to actually give an accomplice a death penalty, when
3 we get to the punishment phase, the law imposes a little bit
4 different standard, a higher standard, than just finding him
5 guilty.

6 In order to find an accomplice guilty,
7 you'll remember from our discussion a few moments ago, that
8 the jury has to find that the person should have anticipated
9 that a life would be taken.

10 What the law says in Special Issue No. 2
11 is before a person can get the death penalty, the jury must
12 feel that the person actually anticipated, okay? Did
13 anticipate that a life would be taken, which to some people
14 is kind of the same thing. To some people it's not. Some
15 people see that distinction, some don't. I'm curious. What
16 do you think about "should have" versus "did anticipate"?

17 A. I see the distinction.

18 Q. You know, some people tell us it's just a
19 matter of semantics, you know. I will tell you we didn't
20 draft these questions, the Legislature did. So, if you're
21 thinking we --

22 A. And they were lawyers like you.

23 Q. Yeah. Probably why they don't make any sense.

24 A. I can see the distinction where you expect a
25 person would, should, think things through and should, but

1 the other question is they did anticipate it.

2 Q. Uh-huh.

3 A. As if they had a plan, as if they had weighed
4 whatever cost or risks or whatever, like software plans.

5 Q. And some people see the distinction, but they
6 say, listen, if I think a person should have anticipated, I
7 think they did anticipate. You've just drawn too fine a
8 distinction, you're playing word games, it's semantics, and
9 as a practical manner, I may see the distinction
10 theoretically. But practically, I just really don't see a
11 distinction. I'm just curious --

12 A. I can see that there's a line between that.
13 In my own project plans, you know, there's things I should
14 consider, but I can certainly argue the point that I didn't
15 consider them.

16 Q. Okay. Fair enough. That question also starts
17 off with a no answer. It's part of our burden of proof to
18 prove it to you that it should be answered yes. If
19 questions 1 and 2 are answered yes, then you move on to that
20 third Special Issue.

21 We ask you to kind of go back, look at
22 the facts of the crime, look at what you've learned about
23 the defendant's character and background -- you'll notice
24 defendant is misspelled the second time you see it in that
25 question -- and we ask you to look at their personal moral

1 culpability, what sort of blame they bear, and ask yourself
2 is there any reason their life should be spared? You know,
3 basically, is there anything mitigating?

4 The law kind of, again, contemplates that
5 even at this late stage in the process, a juror have an open
6 mind. Where we run into problems sometimes, is some jurors
7 said, okay, I found them guilty of capital murder, I kept my
8 open mind through Special Issue No. 1, but I answered it
9 yes. I kept my mind open to Special Issue No. 2, but I
10 answered it yes.

11 You know, they're a future danger, they
12 should have anticipated, and they committed capital murder.
13 And they tell us, you know, basically, when it gets to
14 Special Issue No. 3, it's too far along in the process. I
15 don't really see any value to it. At that point there's
16 nothing there that's going to cause me to spare his life.

17 Some people say, no, I could keep that
18 open mind. I do see value to having that question, even
19 though it's the last stop in the process. What do you think
20 about that?

21 A. I think this might be a time when it's easier
22 to keep an open mind. Maybe you'd, if you are looking for a
23 reason not to give somebody a death penalty, you could maybe
24 find their childhood or something.

25 I, um, it reminds me of all the

1 discussion about the mentally retarded people and whether
2 they should be, you know, someone who is found guilty who is
3 mentally deficient in some way can't be given the death
4 penalty. Well, I don't agree with that.

5 Q. Okay. Why not?

6 A. Because if the case has been tried and they've
7 been sentenced to death, if they, whatever mental capacity
8 they had enabled them to kill somebody, then, you know, I'm
9 sorry. I don't like the situation and I wish we could do
10 something to prevent it, but --

11 Q. Do you think at this stage, you know, feeling
12 that way that you do about that mental retardation factor --
13 and you may know that the Supreme Court fairly recently
14 ruled that states cannot execute people that are found
15 mentally retarded.

16 But having had the opinion that you hold
17 personally, do you think there'd ever be anything mitigating
18 for you in these type of cases, death penalty cases? You
19 mentioned background, but I didn't know if you thought that
20 was maybe mitigating or --

21 A. Well, I don't know if it's true in this case,
22 but maybe somebody just got in with the wrong crowd and
23 couldn't get out, or, um --

24 Q. Okay. So you can see a situation where there
25 might be something mitigating, then?

1 A. Uh-huh.

2 Q. Fair enough. Let me ask you this. Sometimes
3 when we talk about death penalty cases, people kind of
4 impose a little higher burden on us. Normally, in any
5 criminal case, our burden is beyond a reasonable doubt.
6 That's what it is, even in a death penalty case, whether
7 you're trying a shoplifting case or a death penalty case.

8 Some people who are for the death penalty
9 say, fine, I'm for it. And I realize that your burden is
10 beyond a reasonable doubt, but for me to actually execute
11 somebody, it's going to have to be beyond any doubt,
12 reasonable or otherwise. What do you think about that?

13 A. Everybody would like to be one hundred percent
14 sure. And I don't know that that's always possible.

15 Q. Okay. Would you hold us to a higher burden
16 because it's a death penalty case or just beyond a
17 reasonable doubt?

18 A. I would hold you to a reasonable doubt.

19 Q. Okay. Let me talk to you a little bit about
20 some of the things that apply or the type witnesses you may
21 expect to hear.

22 You may hear from police officers,
23 obviously. This is a capital murder case where we've
24 alleged a police officer has been killed. Different people
25 feel differently about police officers as witnesses. I'm

1 just curious if you have any gut reaction to police officers
2 as witnesses?

3 A. No. I stop if they stop my car.

4 Q. Okay. How about psychiatrists or
5 psychologists? Sometimes in these cases either side or both
6 sides will call one of those type of individuals to try to
7 give the jury some insight on Special Issue 1 or Special
8 Issue 3. What are your gut reactions to those type of
9 witnesses?

10 A. I'm sorry, did you say do I object to it?

11 Q. Just your gut reaction.

12 A. Oh, my gut reaction? I would listen to what
13 everybody had to say.

14 Q. Okay. You wouldn't just automatically close
15 your mind because it was somebody from the mental health
16 field?

17 A. No.

18 Q. Okay. As part of our burden of proof, the law
19 says not only, you know, we have to prove our case beyond a
20 reasonable doubt. But we have to prove each and every
21 element of the crime beyond a reasonable doubt.

22 I know you got a chance to look at the
23 indictment and that indictment basically breaks down into
24 different elements, you know, that a certain person on or
25 about a certain day in a certain county killed a certain

1 person in a certain way. And, very roughly, those would be
2 the elements of a murder case.

3 The law says we have to prove each and
4 every element of that to you beyond a reasonable doubt. And
5 if we fail in proving even one element, obviously, you'd
6 have to find the person not guilty. And I think to a lot of
7 people, that makes sense when you're talking about maybe the
8 element of who-dun-it, you know, the identity. Did the
9 State get the right guy? Obviously, if you have a
10 reasonable doubt that we don't have the right guy, you'd
11 find him not guilty.

12 But what the law says, interestingly
13 enough, is that no one element is more important than
14 another legally. Where some people have difficulties with
15 applying this law, just to give you an example, say we
16 allege a murder happened in Grand Prairie. Part of Grand
17 Prairie is in Dallas County, part is in Tarrant County.

18 We allege in our indictment as an element
19 that it happened in Dallas County. But the cops don't do
20 their homework. We don't do our homework. The evidence
21 actually shows you that the crime happened in Tarrant
22 County. You don't have any doubt about the other nine
23 elements. You know we got the right guy and he did the
24 murder. But we just didn't do our job, we got the wrong
25 county.

1 The law would require, even in that
2 situation, for the jury to find the person not guilty, even
3 if they were convinced he did the crime, because we failed
4 to prove that one element.

5 A lot of people don't like that, and they
6 just can't do it. They think it's a technicality, and
7 they're just not comfortable maybe letting a murderer go
8 free under that situation, or finding him not guilty at the
9 least. What do you think about that?

10 A. Well, you know, if -- now, do you think that
11 somebody on the jury would figure it out or do you think
12 that it happened in Tarrant County, I mean --

13 Q. The evidence would come out.

14 A. Well, I mean --

15 Q. A defense lawyer may bring it out, you know,
16 our indictment said Dallas County and you may feel from the
17 evidence and all the physical evidence, the crime scene
18 photos, that it actually happened on the Tarrant County side
19 in Grand Prairie.

20 A. Um, well, if that's what the law says, then
21 that's what you, you know, I mean, it -- I'm sure that the
22 poor guy would be tried in Tarrant County, then, or
23 something.

24 Q. Okay. So you feel you could follow that
25 particular aspect of the law?

1 A. Yes.

2 Q. Okay. Ms. Barron, give me just a second. Do
3 you have any questions for me? I know we've --

4 A. No. Are you the only one that's going to ask
5 me questions?

6 Q. No, no, no. You were also on a civil case; is
7 that right?

8 A. Yes.

9 Q. How did that go?

10 A. Well, that was a workman's comp case and we
11 did not award the man whatever he wanted. I can't remember
12 what that was. That was so long ago.

13 Q. Okay. I'm probably about finished. I'm tired
14 of talking. It's late in the day. But any concerns or
15 hesitations you have about possibly ending up on a jury in
16 this case? Anything you think we need to know or that you
17 hadn't told us or you were afraid we were going to ask, but
18 didn't?

19 A. No, when I saw -- I could even remember Mark
20 Cuban and Don Nelson. I would ask myself about the state of
21 mind I was in, but I think the Mavs must have been nearing
22 the playoffs or there was a contract. I think it was a
23 contract stuff.

24 Q. Okay. But you are good to go, if you are
25 selected in this case and could assess a death penalty?

1 A. If you just can't find 12 other people that
2 you like better.

3 Q. All right. Thanks for visiting with me, Ms.
4 Barron. I appreciate it.

5 A. Okay.

6 THE COURT: Ms. Busbee?

7 CROSS-EXAMINATION

8 BY MS. BUSBEE:

9 Q. You know we're just kidding. They get to ask
10 some questions, we get to ask some questions, that's it.
11 And he has gone over so much with you, that I'm not going to
12 ask you very many questions. But what we do is we ask you
13 your opinions about a lot of things on these questionnaires,
14 but we don't tell you what the law is. And I think that we
15 do that on purpose so we get your bare reactions to things.

16 But once, you know, once you came up here
17 to talk to Mr. Wirskey and he asked you some questions, it
18 seemed to me like your essential common sense kind of
19 follows what the scheme is.

20 In other words, you're perfectly all
21 right with the fact that an accessory, which is not the
22 legal definition we use in Texas, but an accomplice, could
23 be found guilty of capital murder, if the facts were there.
24 You have to say yes or no. Is that yes?

25 A. Yes. I wasn't sure you were finished. If the

1 facts are there, yes.

2 Q. And then, of course, once a person is found
3 guilty of the offense of capital murder, it is not
4 automatically a death sentence. There are some additional
5 questions that have to be answered to the jury's
6 satisfaction before a death penalty would be imposed. And
7 if they're not, it's a life sentence. And I'm hearing from
8 you that you think that's a good scheme and you can follow
9 that law?

10 A. Yes.

11 Q. Okay. Because the State is required to prove
12 these issues to you beyond a reasonable doubt and all you
13 have to tell me is that you will make them do that and let
14 the chips fall where they may. And you can follow the law.
15 And I don't think that you're going to answer Special Issue
16 No. 1 yes, just because you found the defendant guilty of
17 the offense of capital murder. If you understand it, you're
18 not supposed to.

19 A. I think that's fair.

20 Q. Okay. And that you're not going to -- you
21 would make the State prove Special Issue No. 2 to you beyond
22 a reasonable doubt. You know, we can't go into the facts
23 and that's -- if you tell me that you can follow the law and
24 you understand it, then I'm satisfied on that point.

25 A. Uh-huh.

1 Q. Okay. Now, but I do want to explore with you
2 this question about the Special Issue No. 3. I don't want
3 to talk about if someone is retarded or, you know, they were
4 raised in a closet, or, you know, any of these things that
5 might come into mind.

6 My question is, in a death penalty case,
7 if you've been on a jury and you decided that someone may be
8 a future danger and you find that they did anticipate a
9 human life would be taken, if you would still be able to sit
10 back and give effect to this question and ask yourself
11 whether the person should receive a life sentence instead of
12 a death sentence, based on something that you've heard about
13 the case or the background of the person convicted?

14 A. So, can I -- so if I thought that this person
15 probably would commit another crime and that he was,
16 intended to kill the other guy --

17 Q. Well, that's --

18 A. If I say yes to the first two and then the
19 third one, I say --

20 Q. Well, that's -- the scheme is, is that there
21 is still -- a juror has to still be able to consider a life
22 sentence --

23 A. Uh-huh.

24 Q. -- based on whatever you have heard,
25 background, the circumstances, perhaps their participation

1 in what happened in the crime. So many things can come in
2 and I don't, A, want to precommit you, or, B, have you
3 commit to me. But just tell me that you would still be open
4 to giving a life sentence under those circumstances.

5 A. It would be hard, but I think I could do it.

6 Q. Okay. Do you have any questions for me?
7 You're tired of talking, I'm sure. We've been doing this
8 all day long.

9 A. No, I don't. I was just thinking, as
10 stressful as this is, I don't think it's as stressful as
11 being on that jury.

12 Q. On the jury that you were on?

13 A. No, I think being on -- I mean, maybe I
14 shouldn't have said that, but --

15 Q. You can say whatever. Well, you can say
16 whatever you want. See, that was all.

17 A. Okay.

18 Q. And nobody else is going to ask you any
19 questions, I don't anticipate, at this point.

20 MS. BUSBEE: Your Honor, I have no other
21 questions of this juror.

22 THE COURT: Thank you, Ms. Barron.
23 Please wait for us one more time and we'll have you back in
24 a few moments.

25 PROSPECTIVE JUROR: Okay. Thank you.

1 THE COURT: Wait for us outside.

2 [Prospective juror out]

3 THE COURT: What says the State on juror
4 No. 3092, Sandra G. Barron?

5 MR. WIRSKYE: Much to the State's
6 chagrin, we could not find a challenge for cause, Your
7 Honor.

8 MS. BUSBEE: We have no challenge for
9 cause, Your Honor.

10 THE COURT: Would you like to step into
11 your office?

12 MS. BUSBEE: I don't think so.

13 MR. WIRSKYE: State would like to
14 exercise a preemptory challenge, Your Honor.

15 THE COURT: Have Ms. Barron step back in.
16 State No. 8.

17 [Prospective juror in]

18 THE COURT: Ms. Barron, thank you so much
19 for coming in today. Your stress will now decrease
20 significantly. I will inform you that you shall not sit on
21 this jury. And we thank you for coming down.

22 PROSPECTIVE JUROR: Well, thank you.

23 [Prospective juror out]

24 THE COURT: Good afternoon. For the
25 record we've got juror No. 3116, Ms. Nancy Carlene Wilkey;

1 is that pronounced correctly?

2 PROSPECTIVE JUROR: Wilkey, uh-huh.

3 THE COURT: Sorry for the delay getting
4 you in. We line up three people in the morning and three in
5 the afternoon and we don't know exactly how long we will
6 speak with one person. I have to balance the 15 against the
7 one or two, so we're here all day and I just try to be as
8 considerate of your time as I can. I'm sorry for the delay.

9 PROSPECTIVE JUROR: Thank you.

10 THE COURT: Obviously, you've had enough
11 time to read the guide I prepared for you, hopefully more
12 than once?

13 PROSPECTIVE JUROR: Yes.

14 THE COURT: And also your questionnaire
15 that you filled out back in May?

16 PROSPECTIVE JUROR: Yes.

17 THE COURT: With those two items in mind,
18 this process will involve the attorneys going over the law
19 with you and helping you understand how it all relates. At
20 the end of the day the Court has to answer two questions.
21 Number one is do you understand the law? And, number two,
22 can you follow the law? That's the big picture I have to
23 look at. The only question I have for you at this time is
24 will you be able to serve this Court for a period of two
25 weeks beginning on November 10th?

1 PROSPECTIVE JUROR: Yes.

2 THE COURT: Thank you so much.

3 Mr. Shook?

4 MR. SHOOK: Thank you, Judge.

5 NANCY WILKEY,

6 having been duly sworn, was examined and testified as
7 follows:

8 DIRECT EXAMINATION

9 BY MR. SHOOK:

10 Q. It's Wilkey; is that right?

11 A. Wilkey.

12 Q. My name's Toby Shook. I'm going to ask you
13 questions on behalf of the State. And as the Judge said,
14 there aren't any right or wrong answers. We just want your
15 honest opinions. You have been pretty straightforward on
16 the questionnaire, so I don't anticipate any problems in
17 that area. And if you have any questions at any time, feel
18 free to ask, okay?

19 A. Okay.

20 Q. Let me go over one thing. You know, we ask a
21 whole lot of people down here. You remember that jury room
22 was full because people feel differently and have different
23 things going on with their lives. And we can't always just
24 make decisions based on the questionnaires, so we have to
25 have people come down to do some follow up.

1 The thing that I wanted to ask you about
2 is, we ask if there is anything that would cause you to, any
3 reason you could not sit as a juror in this trial and be
4 absolutely fair to either side, and you had rather a unique
5 problem in that you don't drive and you live out in
6 Mesquite.

7 A. Yes.

8 Q. And the problem is the lack of public
9 transportation.

10 A. Yes.

11 Q. And this is kind of a -- it's a more lengthy
12 trial than most of the trials we have down here.

13 A. Yes. I could have -- it could be a hard time.

14 Q. Okay. -- a situation?

15 A. Yes.

16 Q. Regarding that situation, then, that's still
17 the same situation you'd have to have --

18 A. I would have to have transportation back and
19 forth, if it's on a daily basis. It would have to be --

20 Q. It would be approximately a two-week basis.

21 A. Yes.

22 Q. And I take it your husband, he's going to be
23 at work?

24 A. Well, yes, and we've always worked it out, you
25 know. He works -- he could, I mean, like, if I had to

1 serve, I could do it. I have friends. My husband could
2 drop me off before he goes to work and that kind of thing.
3 And then I can get the DART over close enough to my
4 neighborhood to where friends and things could come pick me
5 up.

6 Q. Okay. I take it from that, though, it would
7 be a pretty tremendous inconvenience?

8 A. Yes, it would be.

9 Q. Okay. Let me ask you this. Mr. Wirskye just
10 asked me to go into this area. Do you remember about three
11 years ago, were you a victim in a robbery of a dry cleaners?

12 A. Yes, I was.

13 Q. Do you remember being interviewed?

14 A. Well, actually it was attempted.

15 Q. Okay, attempted.

16 A. Yeah.

17 Q. Do you remember being interviewed by a big
18 tall prosecutor?

19 A. Um, well, yes, now, but I didn't recognize
20 him.

21 Q. Okay. Yeah, that particular defendant is
22 doing a life sentence now.

23 A. Oh, is he? Well, very good.

24 Q. But Mr. Wirskye recognized you.

25 A. Oh.

1 Q. He remembers interviewing you.

2 A. Uh-huh, yes, he did come in.

3 Q. We didn't know that, obviously, at the time
4 you filled out the questionnaire until now. Knowing that,
5 do you think that might influence you some way now that
6 you've --

7 A. Oh, no.

8 Q. You don't think it would?

9 A. No.

10 Q. Fair enough. Let me ask you how you feel
11 about the death penalty in general. Do you favor it as a
12 law?

13 A. I don't know that I favor it or -- it is the
14 law. And I guess as long as it is a law, yes, I would favor
15 it as a law.

16 Q. If it were up to you, if we can make you queen
17 of Texas, would you have the death penalty statute?

18 A. Do what?

19 Q. If we could make you queen of Texas and you
20 could decide the laws, and the decision had to be made as to
21 whether you'd have a death penalty statute, would you have
22 one?

23 A. I would rather not have one.

24 Q. Okay. What kind of law would you have in its
25 place?

1 A. Well, now, that, I wouldn't know. I couldn't
2 answer that. I just, I mean, I don't like the fact of there
3 having to be a death penalty.

4 Q. Because someone's life would be taken?

5 A. Yes, it's --

6 Q. Okay. Let me get into one other thing before
7 I get into that because you put down details on the
8 questionnaire that you have heard or read something about
9 the case, which most jurors have.

10 A. Yes.

11 Q. What details do you recall about the case?

12 A. Well, when I wrote that down, it was just the
13 basics, because I really, I haven't kept up with each trial
14 or anything as it's gone on in the news except for, you
15 know, little snippets that you hear.

16 Q. Right.

17 A. But I remember pretty much on when it happened
18 and --

19 Q. What do you remember about the details about
20 what happened?

21 A. I just remember that a police officer was shot
22 at an Oshman's and that it was a group of people that had
23 broken out of prison, and that he was -- I don't know
24 exactly. My details are just the basics is how I remember
25 it.

1 Q. Do you remember where they were arrested?

2 A. I remember, yes, but they were -- everyone was
3 looking for them and, yeah, I remember that.

4 Q. Was it something you followed pretty closely
5 at the time?

6 A. Well, at the time it was something that was on
7 all the time. But then after it died down some, I really
8 didn't -- didn't hear as much about it as the trials started
9 coming up.

10 Q. What about subsequent trials that have been
11 had? You mentioned that you had seen some snippets.

12 A. It was -- well, just -- now just since this
13 last one that I remembered. But they had very little on the
14 news about it at all. The first one, I can remember the
15 interviews with the mother of the police officer and things
16 like that. And -- but that's really it, pretty much. I'm
17 not really much on keeping the TV on, watching TV.

18 Q. Just tell us, honestly, do you think seeing
19 those stories would affect you in any way as a juror?

20 A. No. I think that, well, I've heard those
21 stories and, like I say, it's like an individual basis on --
22 my problem is as far as being, you know, as far as the
23 shooter, who did it, that was my feeling on it is it might
24 be hard for me to, you know, separate.

25 Q. I lost you there.

1 A. I don't think that watching, as far as what
2 happened on the news, I don't think that that affects me,
3 because that's just the story you're hearing and I don't
4 know details. So my only problem, you know, with -- that's
5 all I've got to say.

6 Q. Do you have a problem?

7 A. I don't have a problem. I mean, I've seen
8 what's on TV. I don't think it would affect me. I think I
9 would really want to hear the story myself. It would be
10 something that I would have to hear, as far as it went down,
11 you know, how things happened and that kind of thing.

12 Q. Okay. Let me -- do you have your
13 questionnaire there?

14 A. Yes.

15 Q. If you can turn to page 9.

16 A. Page 9?

17 Q. Yes. I know it's 17 pages.

18 A. Yes.

19 Q. That last question there is a statement we ask
20 people to agree or disagree with it. It asks about,
21 regardless of what the Judge says the law is, the jurors
22 should do what they believe is the right thing and you said
23 yes and gave us a pretty honest answer, I have to live with
24 my decision.

25 A. Yes.

1 Q. The bottom line is from your personal point of
2 view, you've got to live the rest of your life with your
3 decision, and --

4 A. Yes, because I know, in a sense, I am sending
5 someone to death. It's a decision that would be a very
6 important decision that you make. And I would not -- not
7 want to make the wrong one.

8 Q. Okay.

9 A. And, so, yeah, it would be very thought -- I'd
10 have to think about.

11 Q. A lot of people feel that way. That's why we
12 ask that question. And you -- and all we can do is depend
13 on your honesty and you look like you've been pretty
14 straightforward with that answer, and that you're -- you
15 seem to be a pretty straightforward person.

16 What that question gets at, is sometimes
17 the Judge goes, here is the law, and you've got to follow
18 the law. Some jurors go, I know that, but I've got to live
19 with myself and I can't do it, I can't follow your
20 instructions in those situations. And if that situation
21 comes up, I'm going to go with what I believe is the right
22 thing to do, because I've got to live with my conscience the
23 rest of my life. Is that how you feel?

24 A. Yes, I mean -- but, I mean, if it's within the
25 law, then my conscience would be okay, though.

1 Q. What if you disagree with the law?

2 A. Well, I mean -- but, I could still disagree
3 with it, but it would still be the law. And if, as long as
4 -- I mean, it's just like the death penalty. As long as
5 there's a death penalty, it's --

6 Q. Well, we've got people that will tell us,
7 quite honestly, I don't believe in the death penalty. I
8 don't think we should kill people and execute them. And
9 they know that's the law, but they tell us with all honesty,
10 honesty which I admire, personally, that say, this ain't my
11 kind of case. I've got to tell you right now.

12 A. Yeah.

13 Q. And they believe strongly and honestly and
14 they'll tell us, that's not going to leave my mind. I'm not
15 a human windsock. That's just going to ignore my
16 conscience. And they tell us that honestly. And that's
17 fine. That's why we have about a thousand people that come
18 down here.

19 A. Yeah.

20 Q. They may be fine on a DWI case or burglary
21 case --

22 A. Exactly.

23 Q. -- or something else like that. But you can't
24 very well, if they really are against the death penalty,
25 obviously, you can't expect them to put that out of their

1 mind and then you ask them to answer questions that are
2 going to result in someone getting killed.

3 A. Yes.

4 Q. That's not human. I mean, unless they were a
5 person who didn't have any convictions, of course, I guess.
6 But, you know, there's nothing wrong with disagreeing with
7 different aspects of the law. That's why we go through the
8 questionnaire. So I think sometimes people feel like they
9 have to say, well, if it's the law, I could follow it,
10 because they feel they're a bad citizen.

11 A. Well, it depends on the crime. I mean,
12 really, the way I understand it is the law and that -- and
13 not that I'm, you know, the death penalty. I just -- it
14 would be hard to make that decision and it would be a big
15 decision to have to make. But I think that I could, if I
16 had to.

17 Q. Okay. But from your own personal point of
18 view, then, you don't favor the death penalty?

19 A. Um, I favor it in some things, I mean, I think
20 it is justified in --

21 Q. What types of crimes do you think it is
22 justified?

23 A. Well, I think it is in killing someone, taking
24 another life.

25 Q. Okay.

1 A. And I think that in like sexual, rape, and
2 things like that, I think it might. But like violent kind
3 of things, it would be.

4 Q. Rape cases, even without a life being taken?
5 Do you think some of those?

6 A. No. But I think that's -- for a woman to be
7 raped violently like that, that is like a life sentence for
8 her that she'll have to live with all her life. And so it's
9 something that never goes away for her, so.

10 Q. Do you think a death sentence could be
11 justified in some of those situations?

12 A. On some of them, yes, when they have been as
13 violent as --

14 Q. Okay. Any other crimes you think could be
15 deserving of the death penalty?

16 A. Not that I can think of.

17 Q. Okay. How about the murder of a police
18 officer? Do you think that's the type of crime that could
19 be appropriate?

20 A. Well, yes, that's -- I mean, I think the
21 murder of anyone should.

22 Q. I guess what's important to you is the
23 intentional taking of a life?

24 A. Yes.

25 Q. Okay. If someone is murdered intentionally,

1 that is, if someone has the specific intent to murder and
2 they form that intent and they act upon it and then they
3 kill that person, acting on that intent, is that the type of
4 situation that you think the death penalty is deserved in?

5 A. Yes.

6 Q. Not an accident, obviously?

7 A. No.

8 Q. Not in self-defense?

9 A. No.

10 Q. Not defending a third person, your family, but
11 unjustified murder. Those would be the situations?

12 A. Yes.

13 Q. And then possibly some type of rape cases and
14 that sort of thing?

15 A. Yes.

16 Q. Okay. The way a death penalty case is set up
17 is there is two parts. There's the guilt/innocence stage,
18 where we have to prove to you beyond a reasonable doubt that
19 the defendant is guilty. If we don't, obviously, it's a not
20 guilty. But if we do, we then go to these questions.

21 And, see, that first question asks
22 whether there is a probability that the defendant would
23 commit criminal acts of violence that would constitute a
24 continuing threat to society. It's asking you if you think
25 the defendant is a continuing danger to society.

1 And that's the second part of the trial.
2 It's a yes or no question, obviously, and the State has to
3 prove to you beyond a reasonable doubt it should be answered
4 yes. It starts out with a no answer.

5 But I think the key is this. This is
6 what some people tell us. If you're sitting as a juror and
7 the State has proven to you beyond a reasonable doubt that
8 this person is guilty of capital murder, intentionally
9 taking a life during the course of a robbery, police
10 officer, during a rape, whatever, and you've determined that
11 in your mind that they are guilty of that offense, that
12 tells you all you need to know about question 1 at that
13 point in time.

14 A. Yes.

15 Q. That's how you feel?

16 A. Uh-huh.

17 Q. Once you make that determination that they
18 committed that type of act, then they are a continuing
19 danger and would be a continuing danger to society?

20 A. Yes.

21 Q. And that would answer question 1 for you at
22 that point in time?

23 A. Uh-huh.

24 Q. Okay.

25 A. Yes.

1 Q. Fair enough. Is that something you feel
2 pretty strongly about, when we talk about the intentional
3 murder of another?

4 A. That's the way I feel about it. And that's, a
5 continuing, you know, threat to society, you know.

6 Q. That's the kind of situation you are talking
7 about?

8 A. Uh-huh.

9 Q. Okay. Let me go into another area that comes
10 up sometimes. When we talk about capital murder, we often
11 -- we always think of an example of the triggerman, usually,
12 let's say, the person that actually causes the death. But
13 you can have some situations where an accomplice is
14 involved, someone that didn't actually cause the murder, but
15 they helped. That can happen in any crime and it can happen
16 in a capital murder situation.

17 A. Yes.

18 Q. For instance, you know, you can have a
19 situation where someone is helping, they're encouraging,
20 directing, aiding, they may help someone. But they don't
21 actually cause the murder, groups of people committing these
22 crimes. The law says that these people, accomplices, can be
23 held accountable under certain situations and could even get
24 the death penalty, even though they didn't cause the death.

25 But people tell us different things. You

1 have people that believe very strongly in the death penalty,
2 but from their point of view they talk about the people that
3 cause the murder, the triggerman. If you intentionally
4 cause someone and murder someone in those situations, that's
5 when the death penalty is justified.

6 They would draw a line from their
7 personal point of view on an accomplice, someone that didn't
8 actually cause the murder, but was helping the crime, they
9 might reserve that punishment, a different type of
10 punishment, maybe a life sentence or 99 years or 50 years,
11 but not necessarily a death penalty.

12 They don't think it's quite fair to give
13 the death penalty to an accomplice when they didn't actually
14 cause the death. From their point of view, the death
15 penalty should be reserved just for the actual murderers.
16 Other people tell us no, they think accomplices should get
17 the death penalty.

18 But there aren't any right or wrong
19 answers on that issue, and we ask each juror their own gut
20 reaction on how they feel about that. How do you feel about
21 the accomplice situation, the person that didn't cause the
22 murder?

23 A. That's what makes it hard to -- I mean, if the
24 person did not actually do the shooting, that's what makes
25 it a hard decision to make.

1 Q. Okay.

2 A. But if he had intent, that it could have been
3 him, just as well as the other guy, then I think it's
4 justified.

5 Q. Okay. So if they prove, we prove intent as a
6 party situation, then you feel that that is a death penalty?

7 A. Yes. It could have been him as well as the
8 other one. You know, it doesn't matter, it wouldn't have
9 mattered.

10 Q. And in those situations, then, if someone is
11 found guilty under those circumstances, again, we go back to
12 that continuing danger.

13 A. Yes.

14 Q. That tells you all you need to know about that
15 individual.

16 A. Yes.

17 Q. Okay. Now, there's another situation with
18 parties called conspiracy. An example I'll give you is
19 let's say me and Mr. Wirskye decide we're going to go rob a
20 bank. I go in there and the plan is I'll have a gun. He's
21 going to have his big bag. I'm going to point the gun and
22 threaten everyone. They'll hold their hands up and then
23 he's going to start ransacking the cash drawers, getting the
24 money. During the course of that, I intentionally murder
25 someone.

1 I could, obviously, be prosecuted for the
2 death penalty, I'm the murderer. The law says he can, too,
3 under a conspiracy theory. Because we conspired or agreed
4 to commit bank robbery, the law says that he can be found
5 guilty of capital murder, even if he didn't have the intent
6 that I shoot anybody. He could stand there and say, don't
7 shoot anyone, don't shoot anyone. He can still be found
8 guilty under that law, if you believe he should have
9 anticipated someone should die.

10 So he doesn't have to have that intent to
11 be found guilty under the conspiracy theory. There could be
12 other situations, which you brought up, where he maybe was
13 directing it, said kill these people, that sort of thing.
14 But under the conspiracy theory, he doesn't even have to
15 have that intent.

16 And some people have a problem with that
17 aspect of the law in a death penalty situation. They don't
18 think it's fair that someone could be tried and convicted of
19 capital murder, if they never had that particular intent.
20 Other people feel you can. Again, I just want to --

21 A. If they're both going in armed, then they have
22 the intent.

23 Q. Okay. So you feel in those situations, then,
24 a person could be --

25 A. It could be.

1 Q. -- convicted? And then once you convict them
2 and believe beyond a reasonable doubt of the killing and
3 their participation in it, we go back to your strong
4 feelings about that. That's when they are a danger to you,
5 as far as a person that's willing to commit those types --

6 A. Yes.

7 Q. Okay. Talking about these Special Issues,
8 Special Issue No. 1, obviously, I think what's most
9 important to you is that it's been proven beyond all
10 reasonable doubt that they are guilty of committing a
11 capital murder. We know what your answer would be there.
12 It's going to be yes?

13 A. Yes.

14 Q. That last Special Issue, the mitigation
15 question, it asks the jurors to look at all the evidence,
16 everything involved, and if they see any sufficient
17 mitigating evidence, they can give a life sentence rather
18 than a death sentence.

19 But the problem is this. You don't get
20 to that question unless you've already found that he's a
21 continuing danger to society, and question No. 2 says that
22 either they caused the death, if you believe that, or they
23 intended that person to die, that's kind of on par with your
24 own personal definition, if they had that intent that that
25 person die, if they are the accomplice, or they anticipated

1 that a human life would be taken, so you would also have
2 determined beyond a reasonable doubt that either they did
3 the killing themselves or they intended that person to die.

4 Some people tell us, you know, once I've
5 reached that point and you told me and I know that they are
6 a continuing danger to society and that they intended that
7 the victim die, there's really no way I could give someone a
8 life sentence because they're going to always be dangerous.

9 I couldn't in good conscience give them a
10 life sentence at that point in time because I have reached
11 the point where they are a capital murderer and they are
12 also a dangerous human being. Other people are able to do
13 that.

14 But I just wanted to know your feelings
15 about, if you've reached the point where someone is guilty
16 and they are a continuing danger and you believe they
17 intended someone to die, does that kind of do it for you, as
18 far as the death penalty goes?

19 A. That does. But when you say intended, it's
20 like the accomplice thing, because the accomplice may not
21 have intended for anyone to die. That would be a --

22 Q. Well, on the accomplice thing, what we have to
23 prove is they anticipated someone would die.

24 A. Okay.

25 Q. And, so, again, you wouldn't get to this

1 question, unless you believe beyond a reasonable doubt that
2 they anticipated someone would die.

3 A. Okay.

4 Q. And if that were the situation, then, is that
5 a death penalty situation for you?

6 A. Yes.

7 Q. If it's been proven, also, that they
8 anticipated?

9 A. Yes.

10 MR. SHOOK: Judge, that's all the
11 questions I have at this time.

12 THE COURT: Ms. Busbee?

13 CROSS-EXAMINATION

14 BY MS. BUSBEE:

15 Q. Ms. Wilkey, I'm going to ask you some
16 questions, too, but primarily about some of the things that
17 Mr. Shook asked you about. I think you have expressed to us
18 an attitude that we, like at this table, which is the death
19 penalty is serious and not to be given to someone lightly.

20 A. Exactly.

21 Q. And you have also been honest and said, you
22 know, common sense tells me certain things. Let me talk to
23 you about what the law is and particularly the law having to
24 do with the life or death decision. And Mr. Shook explained
25 it to you rather well, I think, about the ways someone could

1 be found guilty of capital murder.

2 We call them parties in Texas. Most
3 people, including those here at this table, have been using
4 the word "accomplice", because people are more accustomed to
5 using that word, so I'll use the word "accomplice" when I'm
6 talking to you about this.

7 I don't think anyone has a problem saying
8 if you are a group of people who engage in activity, commit
9 a crime, each person is guilty of that crime.

10 A. Yes.

11 Q. Where we come down to the shades of gray is in
12 the various punishments that can be given. And that's true
13 of someone who writes a bad check all the way up to someone
14 who is accused of capital murder. You have stated that you
15 feel certain ways. I just want to talk to you about what
16 the law is and ask if you can follow the law.

17 A. Okay.

18 Q. The law is that once a jury has determined
19 that a person is guilty of the offense of capital murder,
20 that's a life sentence. That is a life sentence with a
21 special provision which says that that person cannot receive
22 or be considered for parole before forty actual calendar
23 years, day for day, have passed. And that's a severe
24 sentence.

25 A. Yes.

1 Q. But when the State seeks the death penalty and
2 if they are asking the jury to consider the death penalty,
3 then certain other questions have to be considered pretty
4 much from the start. In other words, yes, most people would
5 say to themselves, if you committed a capital murder, you
6 are a dangerous person. But if you are on the jury, you
7 have to say, I'll set that aside and consider that question
8 anew.

9 In other words, I'm not going to
10 give the State any help on this. If they can prove that to
11 me beyond a reasonable doubt and I answer that question
12 separately from the evidence, you may not hear any
13 additional evidence, and you may be able to answer that
14 question just based on what you've heard at the first part
15 of the trial.

16 But you have to say that you can consider
17 that anew and make the State prove that to you beyond a
18 reasonable doubt, or be satisfied beyond a reasonable doubt,
19 that that answer is yes. Could you do that?

20 A. If it's been proven to me?

21 Q. Yes, ma'am.

22 A. Yes.

23 Q. Okay. In other words, you're not going to
24 automatically decide that once you understand what the law
25 says, you have to consider that question anew?

1 A. No, it's going to be for me.

2 Q. You can follow that instruction then?

3 A. Yes.

4 Q. Okay. And as for Special Issue No. 2, these
5 are questions that, you know, you wouldn't expect to come
6 down here and have to answer, and we're not going to go into
7 the facts of this case or some hypothetical case. But if it
8 was proved to you beyond a reasonable doubt that a person
9 had anticipated that a life would be taken and that you were
10 satisfied beyond a reasonable doubt that had been proven to
11 you, could you answer that question yes?

12 A. Repeat that again now.

13 Q. Well, I'm just asking you, if it's proved to
14 you beyond a reasonable doubt, could you say yes, that they
15 did anticipate that a life would be taken?

16 A. Yes.

17 Q. Okay. And, on the other side of that, if you
18 weren't satisfied that it had been proved to you beyond a
19 reasonable doubt, you could answer that no, even though in
20 the first part of the trial, you'd answered a question
21 somewhat similar to that having to do with should have
22 anticipated? And the sticking point for most people is,
23 well, a lot of the law that they've never heard of before.

24 A. Exactly.

25 Q. And the second thing is, is that should have

1 anticipated is like sort of a standard that a reasonable
2 person would have anticipated such a thing. But when we get
3 down to are we going to kill that person, you have to go a
4 little extra step to say, not only should have, but did.

5 And that's a distinction. And if you see that
6 and you can follow that law, then you're a qualified juror.
7 So you do see that distinction?

8 A. Yes.

9 Q. Okay. And would you require the State to
10 prove that to you beyond a reasonable doubt?

11 A. Well, yes.

12 Q. And if they did, you could answer that
13 question yes?

14 A. Yes.

15 Q. And if they didn't, you will say no?

16 A. Right.

17 Q. Fair enough. Now, as to this third Special
18 Issue, that's just -- that's not a question that you can say
19 beyond a reasonable doubt that the defense has showed me he
20 shouldn't die, beyond a reasonable doubt the State has
21 proved some other things that proves that he should. It's
22 sort of a safety valve. It says, I've heard some things
23 that make me think this individual should not receive the
24 death penalty.

25 It could be anything. It could be the

1 participation in the offense. It could be, you know,
2 certain things you heard one way or the other about anything
3 at all in this case. Would you still be open to giving a
4 life sentence under those circumstances?

5 A. Well, I think so, because I, just would, you
6 know, like I said, it's a big decision.

7 Q. Well, I'm satisfied that you understand the
8 law and that you could follow it. And the reason we ask
9 your opinions about things is not so much to see if you
10 could follow the law, but just to figure out, you know,
11 whether one side or the other would want you more than the
12 other. I think that's a fair -- but I'm satisfied you can
13 follow the law.

14 Is there anything that you've heard today
15 about the scheme that we have here in Texas that would cause
16 you some -- make you unable to -- or let me put this the
17 correct way. Which violates your conscience to follow the
18 law, if you're placed on this jury?

19 A. No, I don't think so.

20 Q. Do you have any questions or concerns or --

21 A. Not that I can think of at the moment.

22 MS. BUSBEE: Well, I have no more
23 questions of this juror at this time, Your Honor.

24 THE COURT: Ms. Wilkey, I'm going to
25 circle back around to the very first question that was

1 asked, regarding transportation.

2 PROSPECTIVE JUROR: Yes.

3 THE COURT: Is there a particular reason
4 why you do not drive a vehicle?

5 PROSPECTIVE JUROR: No particular reason,
6 just never have. I don't have a driver's license, never
7 have.

8 THE COURT: I mean, it's just -- it's
9 just hard to believe.

10 PROSPECTIVE JUROR: I know, everyone --
11 it's an odd thing that --

12 THE COURT: My grandmother didn't drive
13 until she was 65.

14 PROSPECTIVE JUROR: People just cannot
15 believe that I don't drive. But it's just -- I've always
16 been real nervous and it's always made me nervous. I'm not
17 a nervous passenger. I'm just a very nervous driver.

18 And I married a husband who, I think his
19 mother was killed driving a vehicle when he was 11, and I
20 think that's why he's so understanding. Normally when you
21 get married and your husband would force you to go drive,
22 but he never has.

23 THE COURT: Okay. Let me share with you
24 a concern that I have, if you end on this jury. I start at
25 8:30 in the morning.

1 PROSPECTIVE JUROR: Uh-huh, see, I would
2 have to be here around 7:00 waiting somewhere around here,
3 because I would have to be here before my husband goes to
4 work.

5 THE COURT: Where does he work?

6 PROSPECTIVE JUROR: He works at EDS.

7 THE COURT: And that's in --

8 PROSPECTIVE JUROR: Plano.

9 THE COURT: So you would come from
10 Mesquite. Would he would drop you off here?

11 PROSPECTIVE JUROR: Yeah, he would just
12 drop me, because he's worked around all through here. He
13 knows all the ends and outs, so. He's an elevator mechanic
14 and he's worked on elevators and stuff in a lot of these
15 buildings.

16 THE COURT: I mean, you understand that I
17 have a concern.

18 PROSPECTIVE JUROR: Yes, and I
19 understand. I mean, because this is, you know, a little
20 ways away.

21 THE COURT: If you tell me you can be
22 here at 7:00 waiting on us --

23 PROSPECTIVE JUROR: If y'all told me I
24 had to be here, that would be the only reason.

25 THE COURT: It's just that when we get

1 into this process, there'll be a lot of people that are
2 lined up.

3 PROSPECTIVE JUROR: Yes.

4 THE COURT: And I've been told I've been
5 too rigid and I try to do the best I can.

6 PROSPECTIVE JUROR: Yes.

7 THE COURT: There are a lot of people
8 that are depending on us starting on time.

9 PROSPECTIVE JUROR: Yes.

10 THE COURT: So as long as you can tell me
11 you can be here on time, that's all I need to know. Please
12 wait for us outside and I'll have you back in a few minutes.

13 PROSPECTIVE JUROR: Okay.

14 [Prospective juror out]

15 MR. SHOOK: Judge, since you didn't ask
16 any questions about everything she is disqualified on, I'd
17 like to continue my voir dire, if you don't, if you think
18 she's qualified. I have a lot more to ask her.

19 THE COURT: I figured you would have a
20 few objections here and I wanted to hear them and then I
21 would make a decision.

22 MR. SHOOK: Well, I think she's, um, was
23 pretty matter of fact and said once she found someone guilty
24 of an intentional killing, she's going to -- she's going to
25 find them dangerous.

1 THE COURT: I heard that.

2 MR. SHOOK: And answer those questions.

3 I thought she was pretty honest in that. As well as on
4 question No. 2, as well as in the law of parties, if you
5 think they anticipated, she would also answer question No. 1
6 yes. So I think she's disqualified in those three ways.

7 And I also believe she said on Special
8 Issue No. 3, if she found Special Issue No. 1 and Special
9 Issue No. 2 beyond a reasonable doubt, that then Special
10 Issue No. 3 is not going to be an option. He's going to get
11 the death penalty. So I think in those four ways, she's not
12 qualified.

13 THE COURT: I heard each one of those and
14 I wondered why y'all hadn't agreed up front and then
15 Ms. Busbee was able to get her to follow her end of the
16 spectrum.

17 MR. SHOOK: That's right. But we had a
18 juror early this morning which followed our end of the
19 spectrum and the Court found that juror unqualified.

20 THE COURT: I understand.

21 MR. SHOOK: I think from her demeanor,
22 she, obviously, is going to -- is disqualified because once
23 she finds them guilty and that's what she said.

24 THE COURT: It's a classic vacillating
25 juror.

1 MS. BUSBEE: Your Honor, I don't --I --
2 if I may be heard on this?

3 THE COURT: Yes, ma'am.

4 MS. BUSBEE: We're now in this reverse
5 position of having to say what we've been accused of, which
6 is we didn't explain them the law. The law was not
7 explained to her. She was asked for her gut reactions to
8 things without being told what the law was and once I told
9 her what was law was, she admitted that she would and
10 acknowledged that she would follow it. I don't think she
11 vacillated at all. She wasn't told what the law required.

12 THE COURT: I'm inclined to let Mr. Shook
13 have a redirect and see if she sticks to her position that
14 she now holds. If she does, fine, and if she doesn't, fine.
15 I'm going to stay out of it. And if you wish to circle back
16 around again, we'll do it until we're satisfied. Ask her to
17 come back in, please.

18 [Prospective juror in]

19 THE COURT: We have a few more questions
20 for you.

21 PROSPECTIVE JUROR: Okay.

22 REDIRECT EXAMINATION

23 BY MR. SHOOK:

24 Q. Ms. Wilkey, a few more questions. Let me make
25 sure, I was -- again, we appreciate your patience. As far

1 as your answers to me about how you personally feel about
2 the death penalty and intentionally taking someone's life
3 being a situation that calls for the death penalty, do you
4 still feel that way?

5 A. Yeah, I --

6 Q. Just your honest opinions?

7 A. Yes.

8 Q. Okay. I didn't think you'd changed your mind,
9 but --

10 A. No.

11 Q. The law has been explained to you.

12 A. Uh-huh.

13 Q. But from your personal point of view, if it's
14 proven to you beyond a reasonable doubt that someone has
15 intentionally taken a life during the course of a felony or
16 capital murder, murder of a police officer, whatever the
17 situation may be, and that's been proven to you beyond a
18 reasonable doubt, at that point in time do you feel in an
19 intentional murder situation such as that, that means in
20 your mind that person is a continuing danger to society?

21 A. Yes, beyond a reasonable doubt, if it's
22 proven, yes.

23 Q. Once it's been proven that it's an intentional
24 killing beyond a reasonable doubt, that's what satisfies you
25 as far as a continuing danger to society?

1 A. Yes.

2 Q. And question No. 1 would be yes at that point
3 in time, once it's been proven to you --

4 A. Yes.

5 Q. -- beyond a reasonable doubt?

6 A. Yes.

7 Q. Okay. Same thing is true in an accomplice
8 situation, once it's been proven to you that they either
9 intended that person to die or they anticipated that that
10 person should die or should have anticipated that person
11 should die, again, then you feel that's a situation where
12 they will be a continuing danger to society?

13 A. Yes.

14 Q. And then once you determine that guilt and
15 it's been proven to you beyond a reasonable doubt, you'd
16 feel they'd be a continuing danger to society?

17 A. Yes.

18 Q. Okay. I thought you felt that way, but I just
19 wanted to make sure. You were pretty honest up front when I
20 talked with you.

21 A. Yeah.

22 Q. And I wanted to make sure you still felt that
23 way.

24 A. Yes.

25 Q. Because we've talked about the law and all

1 that and you're just giving us your true feelings?

2 A. Yes.

3 MR. SHOOK: I could inquire into a lot of
4 other issues, Judge, but I will stop at that moment, and
5 then we can go on from there.

6 RECROSS EXAMINATION

7 BY MS. BUSBEE:

8 Q. Ms. Wilkey, this is why people hate lawyers.
9 Did you understand that what Mr. Shook was asking you was
10 whether or not, after you found someone guilty of the
11 offense of capital murder, you would already have decided
12 these punishment issues against the defendant without having
13 to hear any additional evidence?

14 A. Well, now, I wouldn't agree with that. I
15 think that there would be, I mean -- I can -- I could find
16 him guilty, but it would have to be -- you may be saying
17 beyond a reasonable doubt with the evidence that I could
18 give him the death penalty. But I may would want to, you
19 know, it would be like an overview on the whole. It would
20 not just be the death penalty would be.

21 Q. Right. So you understand that what he was
22 asking you, and I'm not accusing him of confusing you,
23 because this is confusing.

24 A. Yes.

25 Q. We don't have to make it any more confusing.

1 I think you're telling us the same thing, but when we ask
2 you, we think we're getting different answers.

3 A. Sometimes I feel like I'm getting --

4 Q. This is the deal. As basic as I can make it.
5 The law is, if you found someone guilty of the offense of
6 capital murder, intentional party, conspiracy, all those
7 different ways, you get to this second part of the trial.

8 The law says no matter what your feelings
9 might be, if you can set them aside and have the State prove
10 to you these Special Issues beyond a reasonable doubt, that,
11 of course, it would be 1 and 2, then you are qualified to
12 sit as a juror. Everybody has opinions and feelings.

13 A. Uh-huh.

14 Q. But if you can make the State meet their
15 burden on those before you'd find those things to be a yes
16 answer, then you can follow the law and you are okay. You
17 are qualified.

18 A. I can follow the law. I mean, if these are
19 the yes, they have to be yes answers, and that's what I've
20 got to be looking for to see if I get those answers.

21 Q. And you'd make the State prove that to you?

22 A. Yes.

23 Q. Okay. And then this second question is kind
24 of a -- I call it a touchy feely thing. It's -- you can't
25 necessarily know what it would be, but if you saw it, you

1 would certainly -- your mind is not closed to giving a life
2 sentence.

3 A. No, my mind is not closed to a life sentence.

4 Q. So I appreciate your honesty, because most
5 people would say, yeah, that's how I feel. But -- and then
6 most people would also say, like you do, but if the law says
7 I need to make the State prove that to me beyond a
8 reasonable doubt, I'll set my feelings aside and make them
9 prove it.

10 A. Yes.

11 Q. Fair enough.

12 REDIRECT EXAMINATION

13 BY MR. SHOOK:

14 Q. So you would be able to set your feelings
15 aside is what you are saying?

16 A. Yes, I think I -- yeah, because it's not my
17 feelings, I mean, it's the law. It's -- I mean, I can't go
18 by -- I mean, I know my feelings.

19 Q. Well, you said in your -- on page 9 again, I
20 have to live with my decisions.

21 A. Exactly, I would have to live with my
22 decision. But if it's -- I mean, my decision, I mean, it's
23 like the law of the land decision, I guess. It's not -- and
24 I can live with that. I mean, I would not make that
25 decision lightly, not at all. I mean, it would be a big

1 decision to make. But I would want to make sure I was
2 making the right decision. And so I would -- it would be an
3 overview of it all before I would make a decision like that.

4 Q. A decision like what?

5 A. Capital, I mean, a death sentence.

6 Q. So if we proved to you beyond a reasonable
7 doubt that he's guilty of intentionally taking a life and
8 you're satisfied with that in your mind --

9 A. If you proved to me that he has taken a life,
10 I still would have to go down to the circumstances and all
11 of that and, I think, before I could give a death penalty.

12 Q. Okay. Ms. Wilkey, let me ask you, do you want
13 to be on this jury?

14 A. Not really.

15 Q. Okay. Are you familiar with the method of
16 execution in Texas?

17 A. Lethal injection?

18 Q. That's right.

19 A. Yes.

20 Q. Have you read about it or covered any, seen
21 any news stories?

22 A. I've just heard here and there.

23 Q. Okay.

24 A. I've not really --

25 Q. You do know that Texas actually does carry out

1 the death penalty?

2 A. Oh, yes.

3 Q. Okay. Some states have it and they never do.

4 A. Uh-huh.

5 Q. But Texas is a state that does. In fact, it
6 leads the nation in executions. There have been 20
7 executions so far this year. But we -- since the death
8 penalty was reinstituted, we lead the nation. And the
9 procedures are the same in each case. We've kind of gone
10 over the scheme with you.

11 If someone's found guilty, you get these
12 Special Issues. If they are answered yes, yes, and no, then
13 the Judge doesn't have any discretion. He would sentence
14 the defendant to death. You don't write life or death in.
15 It's all determined by how you answer those questions. If
16 you answer them any other way, it's going to be a life
17 sentence. But those are the only two possible outcomes.
18 Does that make sense to you?

19 A. Uh-huh. So the answers to those have to be
20 yes, yes, and no?

21 Q. Would equal a death sentence.

22 A. Would equal a death sentence.

23 Q. And if they're answered any other way, it
24 would be a life sentence. But those are the only two
25 possible outcomes. Now, if it is a yes, yes, and a no, then

1 the Judge would sentence the defendant to death and he'd be
2 placed on death row.

3 The laws and procedures are the same in
4 each case. He would wait there. I can't tell you how long
5 he would, but at some point in time the Judge would actually
6 issue a date of execution. On that date or the day before,
7 he would be moved from death row to downtown Huntsville.
8 There's a prison unit there. You sometimes see it on TV.
9 It's got that big clock. Have you seen that on the news?

10 A. I've seen them when they're down there.

11 Q. They protest sometimes.

12 A. Yes, uh-huh.

13 Q. That's probably where you've seen it.

14 A. Yes.

15 Q. In that prison by law is where executions take
16 place. Now, on the date of his execution under our
17 procedures he will get time with some family members, he'll
18 get time with a religious, maybe a minister, he would get a
19 last meal, if he could eat it.

20 At 6:00 p.m. executions take place. He'd
21 be taken about 18 feet down to the death chamber and laid on
22 a gurney and secured by leather straps. Once in a while one
23 of them resists, but there's guards there trained to prevent
24 that. He'd be secured down. Needles would be placed in his
25 arm and then tubes go to another room where the executioner

1 sits.

2 And at that point in time they bring in
3 relatives of the deceased who can sit in one viewing room
4 and relatives of the defendant. After they are assembled,
5 the warden allows the condemned to make a last statement and
6 these are often reported in the media. You may hear that
7 I'm innocent, I don't know why you're doing this to me, I
8 didn't commit this thing.

9 You may hear about them begging for
10 forgiveness. You may hear about their relatives discussing
11 what happened and how wrong it is. The media likes to cover
12 those in detail. You've probably read some of those
13 accounts.

14 A. Yes.

15 Q. They even have it on a website. After he
16 makes that statement, the warden then signals the
17 executioner which simply injects three types of lethal
18 chemicals. They react very quickly. While he is conscious
19 they collapse his lungs, which forces the air out. It's
20 almost an involuntary reflex to try to catch that breath.

21 Oftentimes reporters talk about someone
22 snorting, making noises. That's the air escaping. The
23 heart suddenly stops. And within a few seconds they
24 generally fall into unconsciousness, knowing what's
25 happening to them. Within a few moments they are pronounced

1 dead.

2 That's the procedure that happens in each
3 case and that's the procedure that would happen in this
4 case. And we can't go into the facts, obviously, but we
5 have the -- feel we have the type and quality of evidence to
6 convince a jury to answer those questions in a way that
7 would result in the execution in that method I've described.

8 I don't mean to be morbid, going into it,
9 but it's one thing when we talk about it philosophically
10 here and it's quite another when we talk about sitting on a
11 jury and making these decisions of life and death.

12 Because some jurors come down here,
13 they're opposed to the death penalty on religious reasons
14 and they tell us, matter of factly, I'm opposed to it. I
15 couldn't live with myself in making that decision and I
16 can't make that decision. We have some jurors that are
17 adamantly for the death penalty and really can't be fair.
18 We have other jurors who are for it and could make the
19 decision.

20 We have other jurors who are for it
21 philosophically and think it's necessary in some cases, but
22 when it gets down to it, it would weigh on them too much.
23 It would interfere with their decision because they would be
24 thinking about this person they saw every day, living,
25 breathing, maybe even hear them talk, and they couldn't.

1 That would weigh on them too much.

2 And it's fine if they feel that way. I
3 kind of use an example of these buildings downtown when I
4 see these window washers up 50 floors. I'm glad someone
5 will do it.

6 A. Uh-huh.

7 Q. But I would never get out there. Some people
8 feel that way about the death penalty. Now, we can't put
9 you in this situation and preview the facts and see how you
10 are going to come out. But you have, quite honestly,
11 expressed some reservations to us about the law itself and
12 that type of decision.

13 As you sit here today and after we've
14 talked to you and after you've seen this man living and
15 breathing in the same room with you, is this actually the
16 type of case you feel you could sit on and make these
17 decisions, knowing he would be executed someday?

18 A. Well, I don't know, unless I were to do it.
19 And I don't know how I'll handle it at the moment. Right
20 now it's kind of surreal, you know. It's -- so I'm not
21 really sure how I'll handle it. But I think that I -- I
22 could, you know, listen to the evidence and make a decision.

23 Q. Do you think you can make a decision that
24 would result in his execution?

25 A. If it's beyond a reasonable doubt.

1 Q. I just want to make sure because I've had
2 people and we've had situations where they get on here and
3 they say, I can't do this. And then we've had other people
4 that tell us, I have too much hesitation.

5 A. I can't tell you how I feel at the moment when
6 I'm here doing it.

7 Q. Do you think you might have some hesitation?

8 A. Well, it's possible I could. You know, I
9 might get here and have a whole different feeling on it when
10 I'm hearing everything, and so.

11 Q. Okay. Let me go into some other areas of law,
12 then. The State has to prove to you each and every element
13 of the case beyond a reasonable doubt. The law says that if
14 we are unable to prove and you have a reasonable doubt on
15 any element, any part of the indictment, then you'd have to
16 find him not guilty.

17 That includes an element called Dallas
18 County, for instance. If we proved to you beyond a
19 reasonable doubt who did this killing, how they did the
20 killing, and who they murdered, and under what
21 circumstances, and you believed that beyond a reasonable
22 doubt, but from the evidence you had a doubt about what
23 county it happened in. Maybe you believed it actually
24 happened in Tarrant County. You would be obligated under
25 the law to find him not guilty.

1 Some jurors can do that and some can't.
2 Some tell us, I think the important part is proving who did
3 it and who they murdered and maybe how they murdered, but
4 who did it and who they murdered. And when you start
5 talking about the county it happened in, that's not really
6 an important detail and they disagree with that area of the
7 law.

8 A. Well, I do, too.

9 Q. And they're honest with us and say, look, you
10 get to the point where you've proven this particular person
11 is the one that did it and who they murdered. That's what I
12 need to know. That's important. And the county where it
13 happened is really a technicality. And that doesn't make
14 sense that I'd have to find them not guilty, if I had a
15 reasonable doubt about that.

16 A. That's true.

17 Q. And is that how you feel?

18 A. Yes.

19 Q. And that doesn't make you a bad citizen
20 necessarily. It just makes you an honest one, if that's
21 truly how you feel. Because the law says no, you've got to
22 find him not guilty. And we've had people that say, all
23 right, I would.

24 And we have other jurors that say, look,
25 Judge, I've got to live with myself, and if I know beyond a

1 reasonable doubt who committed the crime and how they
2 committed it, who they murdered, then the State has proven
3 its case to me and he's guilty. And I'm not going to cut
4 him 'loose so he can go back out in society on a technicality
5 about what county it happened in. Just as a practical
6 matter, I can't do that. I can't follow that area of the
7 law. In good conscience, I can't. I can't violate my own
8 conscience.

9 A. Yeah.

10 Q. If you feel that way, that's fine, because as
11 I said before, some people can follow that particular area
12 of law and some people, who are good citizens, can't. But
13 they're honest with us and say they can't.

14 A. Well, I don't think it should be an issue,
15 what county. We're here and we're --

16 Q. A lot of people feel that way. And are you
17 telling me, honestly, that's one area of the law which we
18 talked about earlier about as far as I have to live with
19 myself, kind of a common sense deal, that if that were the
20 law, you'd disagree with that part of the law and that'd be
21 one of those areas that you could not follow?

22 A. That might be the case, yes, because I would
23 find that kind of frivolous.

24 Q. Okay. A lot of people feel that way. The law
25 is the other way and some people can follow it and some

1 people can't. And, again, it doesn't make you a bad
2 citizen.

3 But you seem pretty upfront on that one,
4 page 9, and that's why I went back to it is the Judge tells
5 you one thing, but your conscience tells you another, would
6 you be able to follow it? And that's why we ask that
7 question.

8 A. Yes.

9 Q. And you said, matter of factly, back in May, I
10 have to live with my decision.

11 A. Yes. Whatever decision I make is what I have
12 to live with.

13 Q. And some people tell me, I couldn't do that.
14 I couldn't cut a guy loose, a capital murderer, in that
15 situation, in that trivial of a situation. That doesn't
16 make sense to me.

17 A. No.

18 Q. And if you can't follow that area of the law,
19 that's fine. That's why we bring a thousand people down. I
20 take it from your answers then, in that one particular area
21 of the law, that's one part of the law that you do disagree
22 with?

23 A. Yes.

24 Q. And that's one area of the law that you
25 wouldn't be able to follow it strictly, if you -- if you, in

1 fact, it's not going to matter in the county, it's the other
2 areas that are important to you?

3 A. That's right. I mean if it -- what county it
4 happened in affects, you know, what happens, then yes, I
5 don't agree with it.

6 Q. Okay. Fair enough. That's one area of the
7 law you do disagree with?

8 A. Yes.

9 Q. Okay. We've had a lot of others feel the same
10 as you, so you're not alone. The presumption of innocence,
11 you know, jurors have to give a person that presumption of
12 innocence at the beginning of the trial. The fact that
13 you've been arrested and charged, indicted, is no evidence
14 of guilt.

15 Now, some people will tell us, quite
16 honestly, either from what they've read in this case or the
17 fact that we are going through this process, they'll say
18 where there's smoke, there's fire. They not necessarily --
19 I don't know if they could start the defendant out with that
20 presumption of innocence. People feel differently about
21 that. How do you feel about the law in that area?

22 A. Explain it again now?

23 Q. Anyone charged with crime is supposed to start
24 out with the presumption of innocence from the jury.

25 A. Yes.

1 Q. And some jurors can give them that
2 presumption. Others think if he's been arrested, indicted,
3 if we're going through all this process, there's got to be
4 something else there. There's got to be something to it,
5 and I couldn't start him out with that absolute presumption
6 of innocence. But people feel differently about it.

7 A. When I come in here, I know I'm supposed to be
8 listening. I mean, it's what happens in here is what I
9 should be basing it on.

10 Q. Exactly. Do you think you could follow that
11 area of the law?

12 A. Yes.

13 Q. So that is one area that you could follow the
14 law?

15 A. Yes.

16 Q. Okay. Fair enough. People agree on different
17 parts. That's one part you could agree? Okay. Let me ask
18 you just how you feel about this other area. If a person is
19 charged with a crime, a defendant, he has an absolute right,
20 if he wants to, he can testify and tell his side of the
21 story. But sometimes defendants choose not to testify.
22 They exercise their Fifth Amendment rights.

23 In those situations the Judge would say,
24 you can't hold that against them. It can't be evidence
25 against them. That's what the law is. Sometimes jurors in

1 capital murder situations have trouble with that aspect of
2 the law.

3 They would say -- they kind of look at it
4 -- the way it's been explained to me is, look, if I didn't
5 commit a capital murder and the State is coming after me
6 with a death penalty and I didn't commit that crime, wild
7 horses couldn't keep me off that stand.

8 So common sense tells them, if he's not
9 on the stand, that means he's guilty or he's done something
10 wrong. It's going to hurt. And they couldn't follow that
11 aspect of the law. Others can follow that area of the law
12 and would not hold that against a person, if they testify.

13 I just want your gut reaction on that
14 area of the law as the Fifth Amendment in a capital murder
15 case. If someone didn't testify, do you think that would
16 enter into your decision-making process?

17 A. Well, it might for a moment. I would be, I
18 would try to think of why he wouldn't want to testify, if he
19 was innocent. But then I know that sometimes words don't
20 come out the way that you think they will when you're up
21 talking to people, and I can understand why some people
22 would not want to, because what they say may not be what
23 they mean.

24 Q. So do you feel that you could follow that
25 particular area of the law?

1 A. Probably, yeah, I probably could.

2 Q. Okay. And do you, in fact, agree with that
3 area of the law?

4 A. Yeah. I think you have the right to speak or
5 not.

6 Q. All right. So you don't have a problem with
7 that. You agree with that area. And the other area we
8 talked about, it's that other part that you have honestly
9 told me you disagree with the law as far as --

10 A. Oh, yes. I didn't realize that was a law.

11 Q. Most people don't. And that's why a lot of
12 people, like you, have told us, look, when it gets down to
13 it, I'm not going to violate my conscience. I just couldn't
14 follow that particular area of the law. Well, I appreciate
15 your honesty in those answers.

16 A. Thank you.

17 MR. SHOOK: That's all we have at this
18 time, Judge.

19 MS. BUSBEE: I have a few more questions,
20 Your Honor.

21 RECROSS EXAMINATION

22 BY MS. BUSBEE:

23 Q. Ms. Wilkey, first of all, I hear you saying
24 that this is a hard decision to give a death penalty.

25 A. Yes.

1 Q. But as you understand the law, you could sit
2 on this jury. And if it was proved to you, you could answer
3 those questions in such a way that the death penalty could
4 result?

5 A. It could, yes.

6 Q. Yeah. But how do you know how?

7 A. Exactly.

8 Q. Okay. Let me ask you this question and put it
9 in context, because I don't think you've ever been on a jury
10 before.

11 A. No.

12 Q. Okay. Well, you took a -- you swore to tell
13 the truth when you filled out the questionnaire and that, of
14 course, carries over to here. But when you -- and if you
15 are selected as a juror, you will take an oath to true
16 answers give according to the law and the evidence. And
17 that's what the jury, that's the vow the jury takes.

18 A. Uh-huh.

19 Q. And I think you called Mr. Shook's example
20 frivolous, and, of course, sometimes we give silly examples
21 about things, just to kind of make the point very clear.

22 Now, it's the defense that is entitled to
23 have every single element proved beyond a reasonable doubt.
24 And if, for instance, in this example, which is out there
25 and highly unlikely to happen, but it illustrates a point.

1 If, in that example, you sat on a jury
2 and you have taken the vow to answer, to follow the law and
3 give true answers according to the law and the evidence, and
4 the State proved the wrong county, they've alleged Dallas
5 and the proof came out that it was Tarrant County, would you
6 really not follow the law?

7 A. I can't say not being there, but, yeah, I
8 would be -- I would have to think about it. I mean, it
9 would be -- there would be the chance that I would not
10 follow the law.

11 Q. Okay. But you understand that you would be
12 swearing that you would follow the law?

13 A. Well, I understand that. But see, like I say,
14 I didn't even know that was a law. I don't know what kind
15 of law it's pertaining to, but I just think that if that is
16 the case and it is a murder trial, it's not about what
17 county, then yes, I would have a problem with it, because
18 why waste all this time and go through all of this over a
19 county issue?

20 Q. Well -- and, see, that's the, that's -- you're
21 being logical and we're being obscure. We use this silly
22 point to illustrate the larger points. If you would hold
23 the State to their burden of proof on that, you would hold
24 them to the burden of proof on the more important matters.
25 But in each, each charge in this state and in every state I

1 know of, alleges a jurisdiction, like a county or, say, a
2 parish in Louisiana.

3 And that's one of the things that the
4 State is required to prove, as well as, you know, who the
5 owner was, if a car was stolen, or where the residence was
6 located, if a house was broken into. It's one of the things
7 they have to prove. And I'm just asking you, because I
8 think you didn't understand what you were being asked, would
9 you make the State prove every element beyond a reasonable
10 doubt before you would find it?

11 And if the evidence wasn't there, would
12 you find for the State without the evidence on any of these
13 elements, including a county? And I realize it's a
14 ridiculous example, but it clarifies your thinking to know
15 that each thing has to be proved by law.

16 A. Yes. Maybe I need to know the laws. I don't
17 agree with all of them.

18 Q. Well, you don't agree with them, but would you
19 follow them?

20 A. I --

21 Q. It would make you mad, I know.

22 A. Yes, it would. And I would think that I
23 really shouldn't be having to follow that law. That just
24 sounds, I mean, as ridiculous as that one is, it just -- you
25 know, I would -- I would be thinking we were wasting all our

1 taxpayers' money for all of this and I would be thinking
2 there was no need to do that for --

3 Q. Right. Because when you think of it
4 practically, you go, no way. But once you realize that that
5 is something that they have to prove to you beyond a
6 reasonable doubt, you would follow the law and in this
7 example, which is a silly example, but in this example --

8 MR. SHOOK: Judge, I'll object to calling
9 it a silly example.

10 MS. BUSBEE: Well --

11 MR. SHOOK: I don't think it's a silly
12 example. It's the law.

13 THE COURT: Sustained.

14 MS. BUSBEE: All right.

15 Q. (By Ms. Busbee) In this example, it's an
16 element as important as identity. Would you, if it was not
17 proved to you beyond a reasonable doubt, find it not too --
18 and if it was, say it wasn't so --

19 A. I'll say I believe the same way I did from the
20 start. I just think that would be a silly thing and I would
21 be thinking that, you know, we're here for a bigger cause.

22 Q. Right, and I understand that. Everybody would
23 say that. I'd say that. But my question is, despite all
24 the thinking how crazy that would be, would you follow the
25 law?

1 A. I can't tell you that I would.

2 Q. Can you tell me that you wouldn't?

3 A. No, I couldn't tell you either way, but, like
4 I say, it could go either way.

5 Q. Depending on the evidence that you heard?

6 A. Exactly.

7 Q. And how strong that evidence was?

8 A. Exactly.

9 Q. So what you're saying is, is that you would
10 make the State prove their case beyond a reasonable doubt?

11 A. Yes, I would.

12 Q. Each and every element?

13 A. Yes.

14 Q. I mean, other than this county issue, is there
15 any other element of this case that you would think would
16 be, you know, silly or ridiculous to not be proved?

17 A. No, no, I can't, no, just the county thing was
18 just kind of --

19 Q. Out there?

20 A. Yeah. But no, I can't, like I say, I don't
21 know all the laws, so I couldn't tell you from one law to
22 the other.

23 Q. And I'm sorry to have to pin you down about
24 this, but I really would like your honest answer. If the
25 State fails to prove any element of the case to you beyond a

1 reasonable doubt, any element, now you know what these
2 elements consist of. It's everything alleged in the
3 indictment. If they failed to prove that to you beyond a
4 reasonable doubt, would you follow the law?

5 A. Yeah, I'll follow the law, I mean, to me, like
6 I say, I have to live with my conscience. It's going to be,
7 you know, there's the law and then --

8 Q. It would offend you, I suppose, if it was the
9 county, but would you follow the law?

10 A. I think I would.

11 Q. And make them prove it to you beyond a
12 reasonable doubt?

13 A. Yes.

14 MS. BUSBEE: I have no more questions of
15 this juror at this time, Your Honor.

16 THE COURT: Thank you, Ms. Wilkey.
17 Please wait for us one more time outside.

18 PROSPECTIVE JUROR: Okay.

19 [Prospective juror out]

20 THE COURT: Court does not believe that I
21 need any further arguments on this issue. I will rule,
22 unless you wish to expound further because she's all over
23 the map.

24 MS. BUSBEE: You are looking at me when
25 you're saying that. It's our position that she's qualified.

1 THE COURT: She's gone several different
2 directions on me and after an hour and -- it started at 3:45
3 and it's 5:00, she's still going back and forth and I'm not
4 going to seat somebody on this jury that just doesn't, A,
5 understand the law, and, B, tells me, well, I think I can
6 follow the law.

7 MS. BUSBEE: May I inquire of the Court
8 as to which, what area the Court thinks that she's
9 disqualified?

10 THE COURT: She's given me different
11 answers, depending on who is asking the questions, is why I
12 stayed out of it. And then Mr. Shook tied her down real
13 good and tight on the element issue, and then you came back
14 around and you did an excellent job on rehabilitating her.

15 MS. BUSBEE: Well, Your Honor, it's my
16 position that once she understands that she would be asked
17 to follow the law, she would do it. She -- but when asked a
18 question in a general sense, she gives her common sense
19 answer. So I would like the Court to inquire. You said
20 you'd stay out of it, but if she's vacillating, perhaps the
21 Court could make a better inquiry, if that -- I don't think
22 she's vacillating.

23 THE COURT: Well, I've made enough notes
24 in my mind that she's simply not either, A, understanding,
25 or, B, trying to answer the person asking the question to a

1 degree to get off the stand. So I'm not going to find her
2 to be qualified.

3 MS. BUSBEE: And did you say which area
4 you felt she was unqualified in? Which law you felt she was
5 unable to follow?

6 THE COURT: She's all over the page. Ask
7 Ms. Wilkey to come back in.

8 [Prospective juror in]

9 THE COURT: Ms. Wilkey, thank you for
10 giving us all afternoon, especially with your transportation
11 issues. I'm sorry to put you out in the 5:00 traffic on
12 foot.

13 PROSPECTIVE JUROR: I know, but I'm not
14 driving.

15 THE COURT: You're not going to be on
16 this jury.

17 PROSPECTIVE JUROR: Thank you.

18 THE COURT: So I appreciate your time and
19 service to this Court. Thank you.

20 [End of Volume]

21
22
23
24
25 STATE OF TEXAS

*

1 COUNTY OF DALLAS *

2 I, NANCY BREWER, Official Court Reporter for the 283rd
3 Judicial District Court, do hereby certify that the above
4 and foregoing constitutes a true and correct transcription
5 of all portions of evidence and other proceedings requested
6 in writing by counsel for the parties to be included in this
7 volume of the Reporter's Record, in the above-styled and
8 numbered cause, all of which occurred in open court or in
9 chambers and were reported by me.

10 WITNESS MY OFFICIAL HAND on this the 4 day of
11 March, 2004.

12
13
14 Nancy Brewer
15 NANCY BREWER, CSR, NO. 5759
16 Expiration Date: 12-31-04
17 Official Reporter, 283rd JDC
18 Frank Crowley Crts. Bldg. LB33
19 133 No. Industrial Blvd.
20 Dallas, TX 75207
21 (214) 653-5863
22
23
24
25